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PATTEE'S

ILLUSTRATIVE CASES

IN CONTRACTS

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ILLUSTRATIVE CASES

IN

CONTRACTS.

BY

W. S. PATTEE, LL.D.,

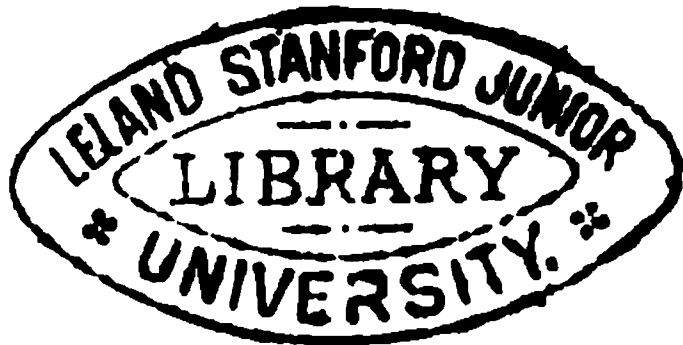
DEAN OF COLLEGE OF LAW, UNIVERSITY OF MINNESOTA.



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PREFACE.

THIS collection of cases has been made for use in the classroom in connection with my lectures upon the subject of Contracts. Being "illustrative" of the principles considered, I have deemed it desirable to select American cases rather than English, as the student will find an advantage in being particularly familiar with the reports of his own country in the early days of his practice. English authorities, however, are not ignored. They are frequently cited in the notes and much more frequently in the lectures, it being our object to familiarize the pupil with the history and growth of each principle to which we direct his attention.

The cases printed have been selected from the Supreme Court Reports of the United States and from those of twenty-one of the different States of the Union. In treating of the Statute of Frauds, the cases have been selected necessarily from a comparatively few State Reports, because the statute varies so much in the different States that what is authority in one might not be in another. Wherever the student practises, he must consult the statute of his own State; but the cases in this volume will give him a general view of its most important features.

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CASES ON CONTRACTS.

Contract Defined: A contract is an agreement, enforceable at law, whereby a party undertakes to do or not to do a particular thing.

Classification	{	Simple or parol contracts	{	Oral,
		Written,		
		Specialties, or contracts under seal,		
		Contracts of record,		
		Contracts executed,		
		Contracts executory,		
		Contracts express,		
		Contracts implied.		

A Simple or Parol Contract: A simple or parol contract is an agreement whereby a party undertakes, upon a sufficient consideration, to do or not to do a particular thing.

Oral Contract: An oral contract is one expressed by word of mouth.

Written Contract: A written contract is one, all of whose terms have been reduced to writing.

A Specialty: A specialty is a contract under seal.

A Contract of Record: A contract of record is one made and entered of record before a judicial tribunal.

Executed Contract: An executed contract is one where the particular thing agreed to has been wholly performed.

Executory Contract: An executory contract is one where the particular thing agreed to has not been wholly performed.

An Express Contract: An express contract is one, all of whose terms have been positively and expressly assented to by the parties to the contract.

An Implied Contract: An implied contract is one, some or all of whose terms have not been expressly assented to by the parties to the contract, but are inferred by the law from the conduct and situation of the parties.

PARTIES.

A contract, as we have seen, is an *agreement*, and an *agreement*, according to the old authors, is "the union of two or more minds" or "a coupling or knitting together of minds" respecting a thing done or to be done.

A contract, therefore, implies, first, *parties* capable of *agreeing* to something.

GENERAL RULE.

All persons are capable of entering into a contract, *except those whom the law disqualifies in whole or in part.*

Those whom it disqualifies in whole or in part are as follows:—

I.

INFANTS.

In this country the law generally regards as infants, males under the age of 21, and females under the age of 18 years; and they arrive at their majority on the day preceding their 21st and 18th birthday, respectively.

BARDWELL v. PARRINGTON.

Supreme Judicial Court of Massachusetts, 1871.

107 Mass. 425,

AMES, J. A person who was born on the eighth day of September, 1852, would become of the full age of twenty-one years if he should live to the seventh day of that month in 1873. He would be entitled to be considered as having attained his majority at the earliest minute of that day. It was not in the power of the overseers of the poor, therefore, so to bind out the minor in this case as an apprentice, that he could lawfully be held to service as such for any appreciable portion of that day. If the indenture necessarily implies an intent on their part to do so, we should be obliged to say that, in so doing, they exceeded the authority given them by statute, and that the act of binding out the minor was void and of no effect. It has been well said that the authority given to overseers of the poor to interfere in the domestic relations of families, and to

take children from their parents to be bound out as servants to strangers, is a high and arbitrary, if not dangerous, power, in favor of which nothing should be presumed, and everything required for its lawful exercise must be shown affirmatively. We think, however, that the obvious intent in this case was only to bind the apprentice for the term of his minority. It was not necessary to fix the exact date of its termination, and, in the absence of any imputation of bad faith, a slight, accidental, and perfectly natural mistake as to the exact date ought not to vitiate the indenture, but will leave it in the same situation, and with the same legal effect, as if no attempt had been made to name the day of the month when the apprentice would become of full age. The Court therefore ruled correctly (so far as this objection is concerned) in holding the indenture to be an efficient instrument to bind the apprentice during his minority to the plaintiff.

The overseers, in making the indenture, professed to be acting in an official capacity, and in discharge of a public duty. The Court was right in ruling that the recital in the instrument was *prima facie* evidence that Samuel Hayden was a poor person lawfully settled in Shelburne, and actually chargeable thereto; and it is immaterial that the instrument was one to which the defendant was not a party: *Reidell v. Morse*, 19 Pick. 358, 360. It was not conclusive, neither did it shift the burden of proof. And it was discretionary with the Court, and therefore afforded no ground of exception, that after hearing the defendant's evidence upon this point the plaintiff was permitted to put in new evidence, by way of rebuttal, of a kind which might have been offered in chief and as part of his original case. And upon the question whether on the fifth day of April, 1861, Hayden was chargeable upon the town, as it was admitted that he had been for almost a year before that date, the jury were instructed that if, when he removed to another town, the apprentice and two other children of the family remained, with their father's consent, a charge upon the town, the apprentice until five days before and the other two until two months after the making of the indenture, they ought to find that on that day the father was chargeable upon the town. Relief furnished by the town with his consent to some

of his minor children, he not being able to support them himself, is relief to him; and the fact that he had undertaken the support of himself and another part of the family, dependent upon him, would not alter his legal position. He would still be a person receiving aid and support from the public under the provisions of the statutes for the maintenance of the poor: *Wilson v. Brooks*, 14 Pick. 341; *Taunton v. Middleborough*, 12 Met. 35. It is true that the testimony of Fisk is to the effect that on the removal of Hayden he ceased to be a charge on the town; but upon this point the whole of his testimony taken together is, that, although Hayden personally ceased to be a charge, a portion of his family still continued to receive support from the town; and the jury must have found, under the instructions, that this was with his consent.

With regard to the defendant's offer to prove that he had paid the boy for his labor, we think that at that stage of the case it was rightfully rejected. It was not offered in connection, as we understand the report, with any evidence tending to show that the plaintiff had abandoned any of his rights, or had been wanting in due and reasonable exertion and diligence to reclaim the apprentice. If he had not lost his right to the services of the apprentice by any fault of his own, the fact that a stranger, who had had the benefit of them, had paid a party who had no right to the payment, would be immaterial. There might be circumstances from which the jury might very properly infer that the plaintiff had abandoned the right to hold the apprentice. The propriety of such an inference would depend on what the plaintiff knew, or had the means on reasonable inquiry of knowing, as to where the apprentice was and what he was doing. If the plaintiff knowingly suffered the apprentice to make and perform contracts for service, or if the plaintiff, knowing where he could be found, made no efforts, or neglected opportunities, to reclaim him and hold him to his service, he could not maintain his action,—in other words, his relinquishment of all right to hold the apprentice under the indenture could be proved by circumstantial evidence. Mere payment by the defendant to the apprentice without the knowledge or default of the plaintiff would not affect the question.

The result is, that we find no error in the rulings of the presiding Judge; and therefore the
Exceptions are overruled.

Cogel v. Raph, 24 Minn. 194.

KINDS OF CONTRACTS.

The contracts of infants are *valid*, *voidable*, or *void*.

VALID.

Infants may make *valid* contracts for *necessaries*.

GAY v. BALLOU.

Supreme Court of New York, 1830.

4 Wend. 403.

SUTHERLAND, J. A husband is not bound to maintain his wife's child by a former husband. The statute of 43d Eliz. ch. 2, sect. 7, of which ours is a transcript (1 R. L. 286, sect. 21), extends only to natural relations: *Tubb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, 76; and the authorities cited in those cases. The plaintiff, therefore, was under no obligation, either legal or moral, to support the defendant.

The referees, who stand in the place of the jury, have found that the articles furnished by the plaintiff were necessaries, and that the defendant promised to pay for them. The evidence supports that finding.

All the charges are for boarding, lodging, schooling, clothing, and physicians' bills; and there is no evidence or allegation that they were unsuitable in any respect to the condition of the defendant: *Bingham on Infancy*, 86, 7; *Comyn on Contr.* 154, 5; 2 *Kent's Comm.* 195. The report was not questioned on that ground upon the argument; but it was contended that there was no evidence of an express promise on the part of the defendant to pay, and that no promise can be implied.

The evidence of the defendant's promise is certainly as strong

as it was in the case of *Cooper v. Martin*, 4 East, 76. In that case, the only evidence was, that the defendant, in conversation with his sister (who mentioned her own intention of paying for her board), said that he should have paid the plaintiff but for his elder brother, who advised him not to do so. It was not denied that this was sufficient evidence of a promise, but the argument in that case was, that the plaintiff was bound to maintain the defendant, and that the defendant's promise, therefore, was without consideration. But it was held by all the Judges that there was a good consideration, and a sufficient promise. In the case at bar, two witnesses (Mitchell and Storm) testified that they had heard the defendant declare that he was willing to settle with Mr. Gay, and pay him what he owed him, if any thing. Another witness (Loomis) testified that he heard the defendant say that plaintiff had let him have some articles of clothing, but he thought he had charged him for more than he had had. The defendant and the witness examined the plaintiff's account (which was substantially the same as that exhibited on the trial); and the defendant said he did not know but it was right, but should like to have advice and consider, etc. He made no objection to any item.

An express promise, I apprehend, need not be proved, in order to render an infant liable for necessaries. Where the plaintiff's demand is not for necessaries, and the issue is upon a new promise after the defendant came of age, an express promise must be proved; because, there never having been any legal obligation on the part of the defendant, he cannot be legally liable without such promise. A moral obligation is sufficient to support an actual promise, but will not raise or support an implied one: *Thrupp v. Fielder*, 2 Esp. R. 628; 3 Id. 160; 5 Id. 102; *Harmer v. Killings*, 2 Evans' Pothier, 123, numb. 15; 11 Mass. Rep. 147; 1 Pickering, 202; 4 Id. 28; Peake's Ev. 260. But an infant is liable for necessaries, in the same manner as an adult is liable; and his contract or promise to pay is to be established in the same manner. If an infant direct a tailor to make him a suit of clothes, an express promise to pay for them is not necessary in order to make him responsible; or if he be accommodated with board and lodging suitable to his condition, while pursuing his academical or profes-

sional studies, he is bound to pay what they are reasonably worth, though no actual promise to pay can be proved. The promise is implied, and, being for necessities, it is legal and binding.

The admissions of the defendant in this case afford sufficient evidence that the items of the plaintiff's account were paid or furnished at the defendant's request; and being suitable and necessary for a person in his condition, the law implies a promise on his part to pay for them.

In *Wailing v. Toll*, 9 Johns. R. 141, an infant was sued by a physician for medicine and attendance. The only evidence on the part of the plaintiff was, the admission of the defendant that the items charged were correct; but she at the same time said she had not employed the plaintiff, and that she was under the age of 21 years. It was held that the plaintiff could not recover upon this evidence. The Court remarked, that "for any thing that appeared, the defendant was living with her father, and the medicine and attendance were furnished at his request." Such they held was the reasonable intendment; and an infant who lives with and is maintained by her father cannot bind herself for necessities. The confessions of the infant, they observe, when all taken together, showed that she was not responsible, admitting the medicine had been furnished, without something more being proved by the plaintiff. If it had appeared in that case that the defendant had no parent, and that the medicine and attendance were furnished on her credit alone, I apprehend the plaintiff would have recovered.

Motion to set aside report of referees denied.

STRONG v. FOOTE.

Supreme Court of Errors, 1875.

42 Connecticut, 203.

PARDEE, J. In suits against minors, instituted by persons who have rendered services or supplied articles to them, the term "necessaries" is not invariably used in its strictest sense, nor is it limited to that which is requisite to sustain life, but includes whatever is proper and suitable in the case of

each individual, having reference to his circumstances and condition in life.

The defendant applied to the plaintiff for relief from pain and the prevention of its recurrence; he, finding the cause in the defendant's decaying and neglected teeth, immediately began the work of relief and repair, and continued the same from time to time during a period of six weeks, until its completion. It was necessary for the preservation of the teeth and the charge therefor is reasonable in amount. In view of the circumstances of this defendant, we have no hesitation in saying that the services are within the legal limitations of the word "necessaries."

The teeth upon inspection disclosed their condition to the plaintiff; he could see that they had been neglected and were decaying; and the record does not reveal any effort or intention even on the part of the guardian to repair or preserve them.

Again, friends of the defendant in New Haven had twice previously taken him to the plaintiff for dental services, for which bills had been made out in his name, and had been paid; his guardian furnishing the money without warning or objection to the plaintiff. These acts on the part of the defendant and his guardian rendered it unnecessary that the plaintiff should have instituted an inquiry as to a guardianship over the defendant, before performing these last services, as a pre-requisite for a recovery in this suit, the work being necessary to meet an unsupplied want: *Davis v. Caldwell*, 12 Cush. 512; *Brayshaw v. Eaton*, 7 Scott, 187; *Dalton v. Gibbs*, 7 Scott, 117; 2 Greenleaf on Evidence, sec. 366.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

SMITH ON CONTRACTS, 307.

As to what are necessaries, see *Middleberry College v. Chandler*, 16 Vt. 686; *Werner's Appeal*, 10 Norris (Pa.), 222; *Angel v. McLellan*, 16 Mass. 28; *Anderson v. Smith*, 33 Md. 465.

What are necessaries must be determined by the infant's condition and circumstances in life.

Peters v. Fleming, 6 M. & W. 42; *Davis v. Caldwell*, 12 Cush. 512.

Money, in this technical sense, is not a necessary.

RANDALL *v.* SWEET.

Supreme Court of New York, 1845.

1 Denio, 460.

BRONSON, Ch. J. An infant is not answerable for money borrowed, though expended by him for necessities: nor for money borrowed to buy necessities, unless it was actually so applied. And perhaps the infant is not answerable in that case, unless the lender either lays out the money himself or sees it laid out for necessities. But where that is done, the infant is answerable for the money, the same as he would have been for the necessities had they been directly furnished by the lender: *Earle v. Peale*, 1 Salk. 386; 10 Mod. 67, S. C.; *Ellis v. Ellis*, 12 Id. 197; Comb. 482; 3 Salk. 197; 5 Mod. 368; 1 Ld. Raym. 344, S. C.; Macph., Infants, 505, 6; and see *Marlow v. Pitefield*, 1 P. Wms. 558; *Probart v. Knouth*, 2 Esp. 472, *n.* So an infant is liable for money paid to procure his liberation from arrest on execution; and also on mesne process, where the arrest was for necessities: *Clarke v. Leslie*, 5 Esp. 28. The case at bar falls within the principle of those where the infant has been held liable. The money was paid at the plaintiff's request, to satisfy a debt which he owed for necessities. The infancy of the plaintiff would have been no answer to an action by Root & McNaughton; and I think it is no answer to the claim of the defendant.

New trial denied.

Swift v. Bennett, 10 Cush. 436; *Con v. Coburn*, 4 N. Y. 368; *Haine v. Torrant*, 2 Hill (S. C.), 400.

An infant having a parent or guardian who supplies his wants cannot make a valid contract for necessities.

GUTHRIE *v.* MURPHY.

Supreme Court of Pennsylvania, 1835.

4 Watts, 80.

SERGEANT, J. Infants constitute a class of society unable, from want of sufficient discretion, to judge what is best in the regulation of their conduct, and the disposition of their property : and the law, on that account, provides for the appointment of guardians where they are destitute of parents. This safeguard would be of little avail, if third persons, passing it by, could deal directly with the infant, and bind him by his contract. He would be left exposed to the consequences of his own thoughtlessness and credulity, and of the craft of others. It is, therefore, incumbent on those who mean to create an obligation binding on an infant, where he has a parent or guardian extending towards him his care and protection, to apply to such guardian or parent, and contract with him. Though an infant may, in some cases, bind himself for necessities, yet he cannot do even that where he has a guardian or parent who supplies his wants : *Bainbridge v. Pickering*, 2 W. Black. 1325 ; *Warley v. Toll*, 9 Johns. 141. The profession or trade which he should learn ; the person most competent to teach him ; the terms on which the contract ought to be made, are all matters of great moment to the welfare of the infant, and may affect the course of his whole life. If there is any thing in which the counsel and assistance of a parent or guardian are material to his interests, it is this. Our Acts of Assembly recognize an indenture of apprenticeship as valid, where there is a guardian, only when executed by him ; without his approbation, the infant's execution of it is null and void. In the case before us the plaintiff procured the defendant, a boy of sixteen, to enter into his service as an apprentice till twenty-one, to learn the trade of a tailor, without the

knowledge of his guardian ; who, when applied to by the defendant, expressed his disapprobation of the trade, as unsuited to his health. The guardian lived in the same town, and was ready and able to supply the wants of the defendant. The plaintiff, however, took him into his service, and some time after applied to the guardian to bind him. He refused, saying the defendant had gone against his consent ; but if he would serve the plaintiff according to the terms they had agreed on, it was well, or words to that effect ; but he would not interfere further in it. The plaintiff, therefore, took and retained him without the contract of the guardian, and at his own risk. In about two years the defendant's health was impaired ; he was obliged to quit the service in which he had worked faithfully ; and the plaintiff now sues for the moneys expended in boarding and clothing, beyond what the defendant's services were worth to him.

It is manifest, on the principles already stated, that the plaintiff has no cause of action whatever. If he has chosen to disregard the rules of law which forbid such a dealing with the infant, he must take the consequences. It is impossible to separate the articles furnished in pursuance of the contract of apprenticeship from the contract of apprenticeship itself. They constitute a part of it ; and every part was against the policy of the law, and void. It is in vain to argue that the mere contract of apprenticeship may be bad, and yet that a responsibility may arise from delivering articles, or disbursing moneys under it ; or to say that the plaintiff took the defendant away from the care and protection of his guardian ; and, therefore, the latter would be liable for necessaries. The very taking him away from that care and superintendence was an illegal act.

The plaintiff's argument is *exceptio ejusdem rei cujus petitio dissolutio*. What would be thought of a person who should take an infant from his parent, and induce him to bind himself apprentice without the knowledge or consent of the parent, and afterwards charge the parent for clothing and boarding furnished the infant while in his service ? The infant's express promise to pay for the articles, in the present case, would have been invalid. The law would not raise an implied promise

from their delivery under an unauthorized contract; and, therefore, neither *assumpsit* nor any other form of action lies to recover the price of them in damages, or otherwise.

Judgment reversed, and a *venire facias de novo* awarded.

Wailing v. Toll, 9 Johns. 141 ; *Angel v. McLellan*, 16 Mass. 28.

VOIDABLE.

Those contracts which an infant can make, other than for necessities, are *voidable*.

HUNT v. PEAKE.

Supreme Court of New York, 1826.

5 Cowen, 475.

SAVAGE, Ch. J. The general principle is against the liability of the infant ; and I do not find that this case is an exception. In *Holt v. Ward*, 2 Str. 937, it was decided, after full argument and deliberation, that the contract to marry by an infant is not void ; but voidable at the election of the infant ; yet, as to the person of full age, contracting with the infant, it absolutely binds. Hence, an infant may maintain this action against an adult ; but an infant defendant is not liable : Com. Dig. *Enfant*, B. 6.

The defendant is entitled to judgment.

Judgment for the defendant.

Bool v. Mix, 17 Wend. 119 ; *Weaver v. Jones*, 24 Ala. 420 ; *Nightengale v. Worthington*, 15 Mass. 272 ; *Harner v. Dipple*, 31 Oh. St. 72 ; *Owen v. Long*, 112 Mass. 403 ; *Patchin v. Cromach*, 13 Vt. 330 ; *Lawrence v. McArter*, 10 Oh. 38.

VOID.

An infant cannot appoint an attorney, and his attempt to do so is *void*.

COLE *v.* PENNOYER.

Supreme Court of Illinois, 1852.

14 Illinois, 158.

CATON, J. The question as to what contracts by an infant are absolutely void, or only voidable, is one upon which there has been a very considerable diversity of opinion in different Courts. All agree that the implied contracts of an infant for necessities are binding upon him, as in case of an adult, and all agree that the appointment of an attorney by an infant is absolutely void. The difficulty seems to have been in laying down a rule by which to determine satisfactorily what other contracts made by an infant are void, or merely voidable.

It was laid down by Lord MANSFIELD, in *Zouch v. Parsons*, 3 Burr. 1794, that all contracts which take effect by the delivery of the infant himself, are voidable, and not void; and that it is only such acts as take effect by the delivery of another for the infant, which are absolutely void. He denies the doctrine often asserted, that a lease by an infant reserving no rent, or the surrender of a lease without consideration, are void, as being manifestly prejudicial to his interests; and he says "there is no instance where the other party to a deed can object on account of infancy. Consequently, the infant may let the surrender stand, or avoid it, which proves it to be voidable only." Not long after, in the case of *Keane v. Boycott*, 2 H. Black. 511, EYRE, Ch. J., laid it down as a rule, that those deeds which the Court could see and pronounce to be prejudicial to the interests of the infants, were void; while those which were manifestly to the advantage of the infant, as for necessities, were binding, while all others were merely voidable, and might be confirmed or repudiated after he attains his majority. This rule is approved by Chancellor KENT in his

Commentaries, understanding, as he evidently does, that it does not conflict with the case of *Zouch v. Parsons*, for he says the doctrine of that case "has been recognized as law in this country, and is not now to be shaken. On the authority of that case, even the bond of an infant has been held to be voidable only at his election. It is an equitable rule, and most for the benefit of the infant, that conveyances to and from himself, and his contracts, in most cases, should be considered to be voidable:" 2 Kent, 236. Mr. Wallace, in a very learned note, where all the cases on the subject seem to be collected, says: "The numerous decisions which have been had in this country justify the settlement of the following definite rule, as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessities; the only act which he is under a legal incapacity to perform, is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable, by turn, at his election." If literally understood, there are certainly serious objections to the rule, that the Court must, in every case, inquire whether the deed is for the benefit or to the injury of the infant, and thence determine whether it is void or voidable. In such an inquiry, is the Court to look alone to the face of the deed? or shall it inquire into the circumstances of the transaction? If the former, the Court must often be misled, for it is frequently the case that a deed for the conveyance of land shows but very little of the true character of the transaction, its object being merely to transfer the legal title without a strict regard to the real inducements and considerations which moved the party to the conveyance. If the rule be established, that the face of the deed shall determine whether it was to the advantage or injury of the infant, such deeds will always be framed with a view to that, and will never fail to show an advantageous bargain for the minor. There are serious objections, also, to requiring the Court to hear evidence showing the circumstances of the sale, and thence determine the question of benefit or injury. In the first place, it would interrupt the regular progress of the trial, by a collateral inquiry about facts which when ascertained might induce one to think the bargain advantageous, while another would think it ruinous to the interests of the infant.

But in determining these questions, a certain regard must be had to the interests of the public,—of those who may wish to purchase the estate. A subsequent purchaser finding a regular chain of title, may be required to ascertain whether those through whose hands the title has passed were capable of making an obligatory conveyance, and if he finds any of them are infants, take his chance of a subsequent ratification of the conveyance; but to require him to ascertain all the circumstances of the bargain, and from these to judge at his peril what the opinion of Courts might be of its beneficial character, would leave the common assurances of the country in quite too uncertain a condition. It is far better, in our judgments, to hold all conveyances made by infants in person voidable only, to be confirmed or repudiated by them as they may choose, after they arrive at years of legal discretion. A review of the authorities on this subject would show that this rule has been generally, if not universally adopted, and it is certainly most to the advantage of the infant, while it least subserves the public interests:" *Leslie v. Frazier*, Riley's Ch. R. 76; *Cline v. Beebe*, 6 Conn. 499; *Drake v. Ramsey*, 5 Ohio, 152; *Freeman v. Bradford*, 5 Porter, 270; *Brackenridge v. Ormsbey*, 1 J. J. Marshall, 236; *Bool v. Mix*, 17 Wendell, 120; *Gillett v. Stanley*, 1 Hill, 122.

"Were a deed to be held to be void, it would be binding upon neither party. The adult party might repudiate it as well as the infant; whereas, if held to be voidable only, the adult would be bound by it, leaving it optional with the infant, after he attains his majority, to ratify it or not. With this option it cannot prejudice his interests. He is left to claim the benefit of the bargain if a good one, or to reject it if he has been overreached or imposed upon in his infancy." We have no hesitation in holding in this case that the deed made by the plaintiff during his minority was voidable, but not void. He had a right to revoke it within a reasonable time after he became of age. There are various modes in which the grantor after he becomes of age may disaffirm a conveyance made during his minority, one of which is by bringing an action of ejectment for the premises conveyed, as was done in this case. But this should, no doubt, be done within a reasonable time. Within what time the party should disaffirm the act or be considered

to have approved it, it is unnecessary to determine, at least so far as the conveyance of real estate is concerned, for we have a statute which has settled that question in this case. The eighth section of the twenty-fourth chapter of the Revised Statutes provides as follows: "Every person in the actual possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in such possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to continue the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section." The ninth section prescribes the rule as to vacant and unoccupied land; and the tenth section exempts from the operation of the two preceding sections certain lands in which the public have an interest, and proceeds: "Nor shall they extend to lands or tenements when there shall be an adverse title to said lands or tenements, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, *feme covert*, out of the limits of the United States, and in the employment of the United States or of this State: Provided, such person shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after such disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment." Whether a void deed would constitute such claim and color of title as is contemplated in this statute, it is not necessary for us now to inquire; that a deed which binds the grantee, and actually conveys the legal title, and which can only be defeated by some affirmative act, by the grantor or his representatives disaffirming it, and which to all the rest of the world is good and valid for all purposes, does constitute such claim and color of title, we cannot doubt. Should this be held not within the provisions of the statute, it would be difficult to find one that would, short of an absolute and indefeasible title. It was to quiet possessions held in good faith, but under defec-

tive titles, that this statute was passed, and not to give security to those who were already secure. The bill of exceptions in this case shows that the plaintiff executed the deed in question in 1833, and that in 1835 he became twenty-one years of age, and after the lapse of sixteen years he commenced this action, for the first time, so far as we know, claiming the title in opposition to his deed. Arthur, the immediate grantor of the plaintiff, took possession of the land. From him the title was regularly transferred to the defendant in this action, through several mesne conveyances, which were all regularly acknowledged and recorded ; and those under whom he claims have had the actual and continued possession, and have paid all taxes due thereon since 1839, a period of twelve years immediately antecedent to the commencement of this action. During all of this time, and for the four previous years, the plaintiff had been of age, and legally capable of asserting his rights, had he chosen so to do, while the statute requires that he should have asserted them within three years after his disability was removed. It is true that this statute has been passed since he attained his majority, but the defendant has held possession and paid the taxes more than seven years since its passage, and this entitles him to the benefit of the statute.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Tucker v. Moreland, 10 Pet. 59 ; s. c. 1 Am. Lead. Cases, 280, note.

But see *Cummings v. Powell*, 8 Texas, 80-88 ; *Ferguson v. Houston*, etc., Ry., 73 Id. 344.

VOIDABLE CONTRACTS AFFIRMED.

All *voidable* contracts of an infant may be made *valid* by his ratification or affirmance thereof *after he has reached his majority*, but not before.

GOODSELL *v.* MYERS.

Supreme Court of New York, 1830.

3 Wend. 479.

SAVAGE, Ch. J. The note of an infant is *voidable*, not *void*: 1 Saund. on Pl. & Ev. 303, and may be ratified after he comes of age. In this case the defendant was an infant when the notes declared on were given, and the infancy is admitted by the pleadings. The evidence of a subsequent ratification was merely a loose conversation, not with the payee or holder, or agent of the payee or holder of the note, but with a stranger, and in my opinion was wholly insufficient to charge the defendant. A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed; there should be a promise to a party in interest or his agent, or at least an explicit admission of an existing liability from which a promise may be implied. This case is not similar to that of a note barred by the statute, where there has been a valid instrument, but the statute presumes payment from lapse of time; any admission of an existing debt in such case is sufficient to rebut the presumption. It is not so in the case of a contract by an infant (not for necessities.) The note during the infancy of the defendant was not an available instrument, and never can be available but by force of a ratification after the infant arrives of age; and such ratification, it seems to me, must be equivalent to a new contract.

BIGELOW v. GRANNIS.

Supreme Court of New York, 1841.

2 Hill, 120.

THE COURT. This is not like the case of a debt barred by the Statute of Limitations, where proof of an *acknowledgment* will, under certain circumstances, be sufficient to save the action. In the case of infancy, there must be a new *promise* or ratification of the contract after the defendant has attained the age of twenty-one years; and, as in other cases of contract, the minds of the parties must meet. A promise to a stranger will not answer. It must be to the plaintiff, or, what is the same thing, to his attorney or agent.

New trial granted.

Gillespie v. Bailey *et al.*, 12 W. Va. 70; Hale v. Gerrish, 8 N. H. 374.**HOW AFFIRMED.**

Those acts which are inconsistent with an intent to *disaffirm* the contract are evidence of its *ratification*.

HENRY v. ROOT.

Court of Appeals, New York, 1865.

33 N. Y. 526.

Where an infant purchases land and gives his note for the purchase-money, and after reaching his majority continues in possession of the land, exercising over it acts of ownership, such acts will be regarded as a ratification or affirmance of the purchase.

DAVIES, J. This action was brought to recover the amount of a promissory note for \$600, made at Fort Des Moines, in the State of Iowa, by the defendant, whereby he promised to pay to the plaintiff, for value received, the said sum of \$600, with interest at the rate of ten per cent. per annum, on or before the 15th day of April, 1857.

The defendant set up in his answer two distinct grounds of defence: First. That the note was given for part of the consideration of certain lots, situated in the town of Logan, in the territory of Nebraska; that the agreement for the purchase of said lots was made by the defendant with one Campbell, the agent of the plaintiff, when and whereby the defendant agreed to purchase said lots at and for a price of \$700; that he paid in cash \$100, and gave said note for the residue of the consideration or purchase-money of said lots; that said purchase was the only consideration for the same, and that he relied wholly upon the statements and representations of said Campbell as to the situation and value of said lots. The answer then sets out the representations made, and that the plaintiff's title was good, whereas he had no title to the same, and such representations were untrue, and that he was deceived and defrauded thereby; that he, the defendant, never had possession of said lots, and had never sold or conveyed any or either of them.

For a second defence, the defendant averred that, at the time of making and executing the said note, he was an infant, under the age of twenty-one years. On the trial the note was produced and read in evidence; and the plaintiff rested.

The defendant then offered himself as a witness, and testified that at the time the note was executed he was not twenty-one years of age, and further testimony to the same effect was offered. The defendant attained the age of twenty-one years on the 25th of February, 1857. The witness testified that on the 29th of January, 1857, the day after date of the note, he received a conveyance for said lots of land executed by Campbell as agent of the plaintiff, and that the same was acknowledged the same day. The plaintiff then offered the same in evidence, and the deed was objected to by the defendant's counsel, on the ground that it was not properly acknowledged nor authenticated; that it was not shown that the person who executed it had authority from the grantor, and also that it was not under seal, and therefore void. The Court sustained the objection, and the plaintiff excepted. The plaintiff then offered to show by the witness that defendant took possession of the land under this deed, and that on the 19th of May, 1857, defendant conveyed a portion of the land to one Sandford B. Perry, of

Chicago, by a deed not under seal, for the consideration of \$100. This was objected to by the defendant, on the ground that no title was obtained by the defendant by the paper received by him, and the objection was sustained by the Court, and the plaintiff excepted. The witness testified that the consideration of the note was for the conveyance of real estate.

The deed was then put in evidence by the defendant, and by it the plaintiff, for the consideration of \$100 paid, the receipt whereof was acknowledged, and the further consideration of \$600, to be paid on the 15th of April, 1857, sold, released, and forever quit-claimed to the defendant all his right, title, and interest to the said real estate, and the plaintiff did thereby warrant and defend the above property. It was dated June 29, 1857, and signed, "Wm. R. Henry, by his agent, H. C. Campbell." It was acknowledged on the same day by the agent, before a notary public.

The Court held and decided the paper in evidence conveyed no title to the land in question to the defendant, not being under seal, and no power of attorney shown; to which ruling and decision the counsel for the plaintiff excepted. The Court also decided that the defendant was not bound to tender to the plaintiff a reconveyance; to which ruling and decision the counsel for the plaintiff also duly excepted. The Court also held and decided that the defendant was not liable on the note, because he was an infant when he executed it; to which ruling and decision the plaintiff also duly excepted. And thereupon the Court directed the jury to render a verdict for the defendant; to which ruling and direction the plaintiff also excepted. Thereupon, the exceptions were directed to be heard in the first instance at the General Term, where judgment thereon was given for the defendant. The plaintiff now appeals to this Court.

There is no controversy that the defendant was an infant at the time this note was executed. If he has done nothing since attaining his majority which makes the contract obligatory upon him, then the direction of the Court to the jury to find a verdict for the defendant was correct. But if, however, he promised to pay the note, after arriving at full age, or ratified

the contract, or affirmed the purchase for which the note was given, then the note became obligatory upon him.

The defendant failed to sustain the allegation, by his answer, that any fraudulent representations had been made to him to induce him to enter into the purchase, or that there was any failure of title in the plaintiff, and, consequently, a failure of the consideration of the note.

There has been much discussion in the books as to what acts or declarations of a party will revive a debt barred by the Statute of Limitations, or one discharged by an insolvent or bankrupt discharge, or render obligatory and valid the contract of an infant. There has been a commingling of all these cases in judicial opinions, and, frequently, no clear and marked lines of distinction have been presented. I shall make the effort to eliminate some principles which are applicable to each of these cases, and endeavor to show wherein they differ and the reasons for such difference, and wherein they are coincident, and the principles which have been established as applicable to these three classes of cases. A clear understanding of the various decisions, and the principles settled by them, makes such an examination imperative, and from it we shall discover the doctrine settled, and the reasons therefor.

In *Sands v. Gelston*, 15 Johns. 519, SPENCER, J., lays down what appears to be the correct rules in reference to debts barred by the Statute of Limitations, debts of infants not for necessities, and the debts of bankrupts discharged under the bankrupt Acts. In all these cases, although, by reason of certain provisions of law, such debts cannot be enforced against the debtors, still the debt remains, and the moral obligation to pay continues in full force. Hence it is after a debt is barred by the statute in the one case, or discharged by the operation of the bankrupt or insolvent laws in the other, or in the case of the infant, who, on his attaining his majority, and not before, can make a legal contract, which can be *eo instanti* enforced against him, that, in all these cases, the moral obligation has been held a sufficient and legal consideration, without any other, for the promise or undertaking to pay the debt, by acknowledgment, ratification, or a new promise. In other words, the Courts have, in truth, regarded the old debt as continued or revived, and no new con-

sideration was required to support it. SPENCER, J., says, in *Sands v. Gelston*, "I never could see the difference, as regards the revival of a debt, between one barred by the Statute of Limitations and one from which the debtor has been discharged under the bankrupt or insolvent laws. The remedy is equally gone in both cases. The Statute of Limitations requires all actions on contract to be commenced within six years next after the cause of such action accrued, and not after. The remedy being suspended after six years, there yet exists a moral duty on the part of the debtor to pay the debt; and accordingly, a promise to pay a debt not extinguished, but as to which the remedy is lost, is a valid promise, and may be enforced, on the ground of the pre-existing moral duty. There is, then, no substantial difference between a debt barred by the Statute of Limitations, and a debt from the payment of which the debtor is exonerated by a discharge under bankrupt or insolvent laws. Both of these rest on the same principle with a debt contracted by an infant not for necessities; yet it is singular that in neither of the latter cases will the bare acknowledgment that the debt once existed and has not been paid, support an action—an express promise to pay being necessary." A review of the cases, on the question of what is necessary to revive a debt barred by the Statute of Limitations, will clearly show that a bare or mere acknowledgment of the existence of the debt is sufficient, as the law will imply or infer from its existence a promise to pay it; and it is of little moment whether it be regarded as a new promise or a revivor and continuation of the old one.

In *Johnson v. Beardslee* (15 Johns. 4), an acknowledgment of the debt was holden to be sufficient evidence for the jury to presume a new promise. In *Shulz v. Champlin* (4 Id. 461), the defendant said the debt ought to be paid, and mentioned eighteen months as the time he wanted for payment. This was held a promise sufficient to make him liable. In *Jones v. Moore* (7 Binn. 573), an acknowledgment of a subsisting debt was sufficient to take the case out of the statute, and it was held it would authorize the jury to infer a new promise to pay, or, rather, that the old promise was continued, or, as some choose to call it, revived: *Mosher v. Hubbard*, 13 Johns. 510. On the

claim being presented to the defendant, he did not intimate that he intended to avail himself of the statute; but the only question to his mind seemed to be whether the account had not been paid, and he promised to examine his papers, and, if he found he had paid the order, he was to write the witness, but as the witness testified he had never written, the Court held that this was sufficient to raise an implied promise to pay the money, unless on examination it should be found that the order had been paid, and there was no evidence whatever of any payment: *Sands v. Gelston*, *supra*. SPENCER, J., says: "I am bound by authority to consider the acknowledgment of the existence of a debt within six years before the suit was brought, as evidence of a promise to pay the debt."

In *Clemenstine v. Williamson*, 8 Cranch, 72, MARSHALL, Ch. J., says: "It has been frequently decided that acknowledgment of a debt, barred by the Statute of Limitations, takes the case out of that statute, and revives the original cause of action. So far as decisions have gone, principles may be considered as settled, and the Court will not lightly unsettle them. . . . It is not sufficient to take the case out of the Act that the claim should be proved, or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is *still due*."

The same learned Judge, in *Wetzell v. Buzzard*, 11 Wheat. 309, remarked: "It is contended on the part of the plaintiff that he has proved an acknowledgment of the debt, and that such acknowledgement, according to a long series of decisions, revived the original promise, or it lays the foundation upon which the law raises a new promise. The English and American books are filled with decisions which support this general proposition. An unqualified admission that the debt was due at the time, has always been held to remove the bar created by the statute."

In *Bloodgood v. Bowen*, 4 Seld. 308, GARDINER, J., says: "A mere acknowledgment of an indebtedness is but evidence from which a promise to pay may be inferred. When it is unconditional, a Court or jury may infer a willingness to pay, or a promise to that effect, because it would be difficult to assign any other reason for a voluntary admission of this sort."

MARCY, J., says, in *Depeyster v. Swart*, 3 Wend. 189, "that the bare acknowledgment of a debt, barred by the statute of limitations, is held to revive it."

In *Purdy v. Austin*, 3 Wend. 189, the same Justice says, after discussing the reasoning of the Court in *Sands v. Gelston*, that the unqualified and unconditional acknowledgment of a debt, made by a party within six years before suit brought, is adjudged at law to imply a promise to pay.

In *Bell v. Morrison*, 1 Pet. 351, Justice STORY, in delivering the opinion of the Court, observes that "the rule announced in 11 Wheaton was the result of a deliberate examination by the Court of the English and American authorities," and adds: "We adhere to the doctrine as there stated, and think it the only exposition of the statute which is consistent with its true object and import." He then says: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of the previous subsisting debt which the party is liable and willing to pay." At the conclusion of the opinion, he says that it is to be understood that it is not unanimous, but that of a majority of the Court, and that it has been principally, if not exclusively, influenced by the course of decision in Kentucky on this subject. I think particular note should be made of this remark, as Judge STORY's observations in this cause have been disapproved of by two of the Judges of our own State, hereafter alluded to. It is to be observed that Judge STORY introduces an element which is not, so far as my researches extend, contained in any previous authority, viz.: that the party making the acknowledgment must be "willing to pay." He does not say that he must express that willingness, as some Judges have supposed, or whether that willingness may be inferred from his acknowledgment of the previous subsisting debt. I think the latter view must be the correct interpretation of this remark, as I am unable to find any dictum of any Judge anterior to this, that in addition to the acknowledgment it was required that the party must also express a willingness to pay. In *Purdy v. Austin*, *supra*, the judgment was reversed on the ground that the acknowledgment of the defendant did not amount to an

unequivocal and positive recognition of the subsisting claim in favor of the plaintiff.

In *Stafford v. Bryan*, 3 Wend. 535, SUTHERLAND, J., in delivering the opinion of the Court of Errors, says: "An acknowledgment, which is to have the effect of taking a demand out of the effect of the Statute of Limitations, ought to be clear and explicit in relation to the subject of the demand to which it refers. The acknowledgment or new promise is to be affirmatively established by the plaintiff." He adds: "Although I cannot yield my assent to all the points decided in that case (*Bell v. Morrison*), nor to all the reasonings and positions advanced by the learned Judge who delivered the opinion of the Court, the general views to which I have assented appear to me to be sound and impressive." In *Dean v. Hewitt*, 5 Wend. 257, MARCY, J., remarks, that "the Statute of Limitations proceeds upon the presumption of payment; a recognition of the existence of the debt, after the statute has attached, revives the remedy which was lost, but the cause of action is the same as it was before the remedy. This Court has always considered the acknowledgment or new promise as a continuance of the old promise. . . . The acknowledgment rebuts the presumption of payment; and when made before the statute attaches has the same effect as though made afterwards. It keeps alive, if I may so express it, the remedy. . . . It cannot be said that the new promise either revives the cause of action or the remedy; it only continues the latter." He adds, that he is aware that some of the positions there stated conflict with the views of Mr. Justice STORY, as expressed in *Bell v. Morrison*, but we cannot yield to these views, and give full effect to them, without unsettling principles that have been so long established as to entitle them to be evidence of the laws of this State.

In *Hancock v. Bliss*, 7 Wend. 267, Chief Justice SAVAGE said, the acknowledgment must however be explicit, and without a denial of the equity or legality of the demand: hence if the defendant denies the justice of the demand, or reposes himself upon the statute, a promise will not be presumed.

In *Patterson v. Choate*, 7 Wend. 445, the Court, by SUTHERLAND, J., held that an acknowledgment of an existing indebtedness was sufficient to raise a new promise. There the witness

first stated what the defendant said, as follows: That "the balance as exhibited by their books of account was due to the plaintiff at the time of the dissolution of the copartnership, and had not been paid to his knowledge." Upon being interrupted by the plaintiff's counsel, he said the expression used by Patterson was that the balance was due at the time of the dissolution, and *still is due*, as witness thought; it might have been, that it was then due and never been paid; either version of it amounts to a clear and explicit admission of a subsisting indebtedness.

In *Gailey v. Crane*, 21 Pick. 523, the Supreme Court of Massachusetts says, the doctrine laid down in the case of *Bangs v. Hall*, 2 Pick. 368, was well considered, has since been tested by experience, and is undoubtedly sound and wise. It has been everywhere acknowledged as sound law, (citing a large number of authorities to sustain this position). The Court further say, "the principles there laid down are, that to take a debt out of the Statute of Limitations there must be either an express promise to pay, or an unqualified acknowledgment of *present* indebtedness. In the latter case the law will imply a promise to pay."

In *Allen v. Webster*, 15 Wend. 284, SAVAGE, Ch. J., after reviewing all the authorities, says: "Whatever therefore may be the true philosophy of the rule, and learned Judges have differed on that subject, yet since the case of *Sands v. Gelston* there has been no dispute as to what the rule in fact is, to wit: that to revive a debt barred by the Statute of Limitations, whether the statute theoretically operates upon the debt itself, or upon the remedy only, there must be an express promise or an acknowledgment of a present indebtedness, a subsisting liability, and a willingness to pay." This last remark about a willingness to pay has no foundation but Judge STORY's observation in *Bell v. Morrison*, and which has been disapproved of by two of our Judges; GARDNER, J., states the rule as he is inclined to think it is in *Wakeman v. Sherman*, 5 Seld. 91, in these words: "That to revive a demand thus barred there must be an express promise to pay, either absolute or conditional, or an acknowledgment of the debt as subsisting, made under such circumstances that such a promise may be fairly implied."

And this case also enunciates the rule laid down in many other cases, that the acknowledgment of existing indebtedness or the promise to pay must be made to the party to whom the debt is due, or to his agent: an acknowledgment or promise to a stranger will not answer.

As has been seen from the remarks of Chief Justice SPENCER in *Sands v. Gelston*, something more has been required to establish a debt against a bankrupt, which has been discharged by his certificate, or a discharge from his debts under an insolvent law. In the latter case the debts have ceased to exist. It has been extinguished, and though the moral obligation notwithstanding remains to pay it, and is held to be a good consideration for the promise to pay it, yet there must be a new promise equivalent to a new contract. In the case of a debt barred by the Statute of Limitations, we have seen that the debt is not discharged, but the remedy by action is only taken away or suspended until the debt is revived. In the case of *Roberts v. Morgan*, 2 Exch. 736, EYRE, Ch. J., says a debt barred by a certificate, under a commission of bankruptcy by a new promise to pay it, becomes a new debt. Lord MANSFIELD also says, when there has been a new promise after the discharge, the bankrupt is liable as on a new contract: Doug. 192. The moral obligation uniting to the new promise makes what he calls, in the case of *Truman v. Fenton*, Cowp. 544, "a new undertaking and agreement."

In *Dupuy v. Mount*, 3 Wend. 135, MARCY, J., says: "The bare acknowledgment of a debt barred by the Statute of Limitations is held to revive it; but an acknowledgment of a debt from which the defendant has been discharged, be it ever so explicit, gives no chance of action." After referring to the authorities also alluded to, he says: "The authorities clearly show that the new promise is the contract upon which the action against the defendant must rest. The old debt has no further connection with this suit than what arises from the circumstance that it is resorted to for the purpose of furnishing a consideration for the promise, by reason of its moral obligation after its legal obligation is destroyed by the discharge. The liability, therefore, of the defendant is on the new contract."

A protracted struggle has been maintained in the Courts, on the one hand to protect infants and minors from their own improvidence and folly, and to save them from the depredations and frauds practised upon them by the designing and unprincipled, and on the other to protect the rights of those dealing with them in good faith and on the assumption that they could lawfully make contracts.

Much discussion has been had in the books, by eminent and learned Judges, whether the contracts of an infant were void or voidable, and the earlier decisions were that such contracts were void. And the method adopted by the Courts to protect an infant against the effects of his own weakness has been to consider his acts as not binding: Bingham on Infants, 5. Miserable, says Lord MANSFIELD, in 3 Burr. 1801, must the condition of minors be, excluded from the society and commerce of the world, deprived of necessities, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to them if they were bound by no act. The law, therefore, at the same time that it protects their inability and indiscretion from injury, through their own imprudence, enables them to do binding acts, and without prejudice to themselves, for the benefit of others. And in that case (*Couch v. Parsons*), it was expressly decided that an infant's conveyance, by lease and release, was voidable only and not void. This decision has been considered by many Judges and lawyers as unsound, and particularly by Mr. Preston, in his work on Conveyancing, in which he says, "no lawyer of eminence has thought it safe to follow that decision in practice. To admit, indeed, that such a decision is law, is to confound all distinctions and to oppose all authorities on this head:" 2 Preston on Con. 248; and at page 375 he also says: "It would be well for every lawyer that such a decision had never existed." These views of this learned author show how firmly implanted in the legal mind was the doctrine, that the acts and contracts of an infant were void and not voidable.

We shall see that the modern doctrine is fully in harmony with that laid down in *Couch v. Parsons*, and that such is now the well and firmly established rule of law. A *void* act never is nor ever can be binding, either on the party with whom it

originates or on others. All who claim through or under it must fail, and it never can, at any time or by any means, be confirmed or rendered valid. A *voidable* act is binding on others until disaffirmed by the party with whom it originated: it is capable, at a proper time and by proper means, of being confirmed or rendered valid: Bing. on Inf. 7.

I think it will be found, on a careful examination of the cases and the current of decision by learned Judges, that the doctrine of an express promise by an infant, after his attaining his majority, being necessary to establish a contract as binding made by him during infancy, originated mainly from two sources: first, the notion of the English Judges that it was their peculiar duty to protect infants from their own acts of imprudence and folly; and, second, that their contracts being wholly void, something must be done equivalent to a new contract after coming of age to make that legal and effective which before had no force or existence. And from this latter consideration, I think, another error had its origin into which so many Judges have fallen, that, to make binding a contract of an infant after he attained his majority, acts must be done of an equal character or degree which a bankrupt discharged from a debt must perform to give new life, vigor, and vitality to a debt discharged and cancelled by his bankrupt or insolvent discharge. The promise to pay a debt discharged under an insolvent law, as we have seen, becomes a new contract. In the case of *Roberts v. Morgan*, 2 Exch. 736, EYRE, Ch. J., says a debt barred by a certificate under a commission of bankruptcy, by a new promise to pay it, becomes a new debt. Lord MANSFIELD also says, when there has been a new promise after the discharge, the bankrupt is liable as *on a new contract*: Doug. 192. The moral obligation, uniting to the new promise, makes what he calls, in the case of *Truman v. Fenton*, Cowp. 544, “a new undertaking and agreement.”

In *Lynbury v. Weightman*, 5 Exch. 198, Lord ELLENBOROUGH said that in order to bind a bankrupt by a new promise, he should expect a positive and precise promise to pay; and in a note to this case, *it is said* that bankrupts and infants stand on a different ground with respect to debts from which they are discharged.

If the contract of the infant be not void, but only voidable, can it be justly said that it has been discharged paid, that is, as if it had no existence? It seems to me not, and that the course of argument of many learned Judges, in assuming that the contract of the infant and that of a bankrupt discharged by the Act are to be placed on the same footing, cannot be sustained either by sound reasoning or by authority. I think the foundation of the reasoning lies in the assumption that the contracts of the infant were void. If this were so, then the analogy would certainly be complete. But if voidable only, then it is submitted that it wholly fails, and that the contracts of an infant, which are only suspended during his minority, may be revived and ratified by him on arriving at age, upon the same principles, and for the same reasons, and by the same means, as a debt barred by the Statute of Limitations may be revived and restored to its pristine vigor and efficacy. A review of the cases will, I think, warrant us in arriving at this conclusion.

In *Stone v. Weythipol*, Cro. Eliz. 126, an action was brought against the executor of an infant, on a debt due by him, and which he had promised to pay. Egerton, for the plaintiff, contended that the promise of an infant is not void, but for his non-age he may help himself by plea; but if debt had been brought against him, and he pleads *nil debet*, it shall be found against him, and if at his full age he had payment, it had been good and *in foro conscientiae*, the promise of the infant had been made good. Coke contended that it is no consideration, for every consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant, or charge of the plaintiff, and no case can be put out of this rule, and this contract by the infant was void; and afterwards the Court was clear of the opinion that the action did not lie, for the contract of the infant was merely void, and in debt against him he might plead *nil debet*. Egerton then said, "it had been adjudged in that Court, in *Edmonds v. Burton*, that when an infant was bound in an obligation, and at his full age he promised payment, an action was maintainable against his executor on this promise, to which the Court agreed, for the *bond*, which was the ground of it, was not void, but voidable, and he could not

plead *non est factum* or *nil debet* to a bond, and if at his full age he had accepted a defeasance of the bond, this had made it good, and in the case cited the promise was by the infant himself, which in conscience he ought to pay." *Moning v. Knoss*, Cro. Eliz. 700, was an action of assumpsit, where an infant being bound in a bond for the payment of £17 at his full age, in consideration that the plaintiff, the obligee, would stay the suit he had brought on the bond, he answered that he would pay the £17 on a certain day after. Upon non-assumpsit pleaded, it was found for the plaintiff, and it was alleged in arrest of judgment that there was not any consideration to ground an assumpsit, and in proof thereof the case of *Stone v. Weythipol*, *supra*, was cited; for the bond, not being sufficient to bind him, there is not any cause for him to make this assumpsit, and of this opinion was TURNER, but CLINCH arrested, and the other Judges being absent, the matter was adjourned.

In *Thrupp v. Fielden*, 2 Ex. 628, the action was assumpsit, and the plaintiff proved a payment of £40, on account of the bill, since defendant came of age. For the plaintiff, it was contended that this was an admission by the defendant of his liability to pay, and tantamount to a new promise. But Lord KENYON said: "This is not such a promise as satisfies the issue. The case of infancy differs from the statute of limitations: in the latter case, a bare acknowledgment has been held to be sufficient. In the case of an infant, I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay made by the infant after he had attained that age when the law presumes that he has discretion."

It seems to me these cases have proceeded on the principle, that the obligations of the infant were void, and that on his attaining his majority he was as much discharged from them, on that ground, as a bankrupt is by his discharge under the bankrupt or insolvent laws.

It will be convenient here to examine the course of decision in this country upon this branch of the law.

In an early case in Connecticut (1809)—*Rodgers v. Hand*, 4 Day, 57—the Supreme Court of Errors held, that all contracts made by infants against their interest were void, and that the

same evidence might be required of the confirmation of a voidable contract after full age as of the execution of a new one, to avoid fraud and imposition.

This case was followed by the Court in *Benham v. Bishop*, 9 Conn. 838. DAGGETT, J., there lays down the rule very broadly, that the note of an infant cannot be satisfied by merely acknowledging that he made it, or that it is due. Unlike an admission of the debt barred by the Statute of Limitations, which has been held to remove the bar, and authorize a recovery, he says, in the case of a note or bond of the minor, there must be a promise to pay when of full age.

In *Wilcox v. Roath*, 12 Conn. 550, the language used by the Court is broad and sweeping. It is, that it has been contended that the evidence which would take a case out of the Statute of Limitations is sufficient to prove the ratification of a contract made by an infant. Such, however, the Court says is not the rule. The cases are not analogous. They stand on different grounds, and are governed by different principles. *In the one case*, the debt continues from the time it was contracted. A new promise merely rebuts the presumption created by the statute, and the plaintiff recovers, not on the ground of any new right of action, but that the statute does not apply to bar the old one. *In the other*, there never was any legal right capable of being enforced, and in case of a promise, after the infant became of age, to take upon himself a new liability, proceeded, indeed, upon a moral obligation existing before. Accordingly, it is well settled that a bare acknowledgment is sufficient to take a case out of the Statute of Limitations. But in regard to the contract of an infant, it has been repeatedly adjudged that there must be an express promise to pay the debt after he arrives at full age, otherwise there is no ratification.

In *Smith v. Mayo*, 9 Mass. 62, the Supreme Court held that a direct promise when of age is necessary to establish a contract made during minority, and that a mere acknowledgment, as in cases under the Statute of Limitations, will not have that effect; and it is also stated that the rule is, that such promise must be made deliberately and with a knowledge that the party is not liable by law. In this case the infant made a

bond, and, after he came of age, made his will, disposing of his estate, "after his just debts are paid;" and the Court held, that this expression did not amount to a promise to pay the bond; that it contained a direction only to pay just debts, and there was nothing in the case from which the Court could infer that what was not in law a debt could be considered by the testator as a just debt. The same doctrine was repeated in *Ford v. Phillips*, on the authority of this case, and it was affirmed that a direct promise was necessary: a mere acknowledgment of the debt is not sufficient. But the true doctrine is more accurately laid down in *Whitney v. Dutch*, 14 Mass. 460. There PARKER, Ch. J., says: "By the authorities, a mere acknowledgment of the debt, such as would take a case out of the Statute of Limitations, is not a ratification of a contract made during minority. The distinction is, no doubt, well taken. The reason is, that a mere acknowledgment avoids the presumption of payment which is accepted by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledge the debt or not, and such positive act or declaration on his part is necessary to defeat his power of avoiding it. *But the terms of the ratification need not be such as to import a direct promise to pay.* All that is necessary is, that he expressly agrees to ratify his contract, not by doubtful acts, such as payment of a part of the money due, or the interest, but by words, oral or in writing, *which* import a recognition and a confirmation of his promise."

In *Thompson v. Lay*, 4 Pick. 48, PARKER, Ch. J., says the cases of *Whitney v. Dutch* and *Ford v. Phillips* explicitly lay down the principle that the promise of an infant cannot be revived, so as to sustain an action, unless there be an express confirmation or ratification after he comes of age. "A promise to pay is evidence of a ratification; so is a direct confirmation, though not, in words, amounting to a direct promise; as if the party should say, after coming of age, '*I do ratify and confirm,*' or, '*I do agree to pay the debt.*'" And in *Read v. Batchelder*, 1 Metc. 559, SHAW, Ch. J., says, the question, what acts of an infant are voidable and what void, is not very definitely settled by authorities; but, in general, it may be said the tendency of

modern decisions is to consider them voidable, and thus leave the infant to affirm or disaffirm when he comes of age, as his own views of his interest may lead him to elect, and that it is established in Massachusetts that the note of an infant is voidable only, and may be regarded as a good foundation for a new promise when he comes of age—citing *Whitney v. Dutch* and *Thompson v. Lay*, *supra*, and *Martin v. Mayo*, 10 Mass. 137.

In *Pierce v. Tobey*, 4 Metc. 168, the Court said: "A contract made by a minor may be affirmed after his arrival at full age; and if so done, and by words proper to give it force and effect, as a valid contract, it will be operative and binding upon him. A mere acknowledgment of a debt so existing is not sufficient; but there must be a direct promise, or a *direct confirmation*, before any liability attaches."

In *Hall v. Gerrish*, 8 N. H. 574, the Supreme Court of that State say: "An acknowledgment of a subsisting debt, when a claim has been barred by the Statute of Limitations, furnishes evidence, unless explained or qualified, from which a new promise may be implied; but the promise of an infant cannot be revived so as to sustain an action, unless there be an *express confirmation* or *ratification*, after he comes of age. This ratification must either be a direct promise or by saying, 'I ratify and confirm,' or, 'I agree to pay the debt,' or by positive acts of the infant, after he has been of age a reasonable time, in favor of his contract, which are of a character to constitute a perfect evidence of ratification as an express and unqualified promise." To the same effect is the case of *Robbins v. Eaton*, 10 N. H. 561.

We will now advert to the course of judicial decisions in this State. A reference has already been made to the remarks of Chief Justice SPENCER, in *Sands v. Gelston*, where he observed that he could never see the difference, as regards the revival of a debt, between one barred by the Statute of Limitations and one from which the debtor had been discharged under the bankrupt or insolvent laws. He says: "There is no substantial difference between a debt barred by the statute of limitations, and a debt from the payment of which the debtor is exonerated by a discharge under a bankrupt or insolvent act. *A fortiori*, a debt not discharged, as that of an infant, ought certainly not be placed on the same footing with one which is."

I think we shall find, on examination of the cases in this State, that there has been a great change of views and modification of opinion on the subject of infant's contracts. All the cases hold that the contract of the minor is not void, but voidable only: *Goodsell v. Myers*, 3 Wend. 479; *Evertson v. Carpenter*, 17 Id. 417; *Delano v. Parke*, 11 Id. 85; *Bay v. Gunn*, 1 Denio, 108; *Taft v. Sargeant*, 18 Barb. 320.

Having now, as I think, conclusively established that the promissory note or contract of an infant is voidable only, and not void, and that it is a subsisting liability, which cannot, however, be enforced without some further act on his part after he attains his majority, it will be necessary, in the next place, to inquire what is the rule of law in this State as to acts or declarations of his, which may have the effect of making it legally binding upon him, so that it may be enforced in the Courts against him. It is well to bear in mind that principles of law which were recognized and enforced to protect infants against their acts of indiscretion and folly while of such years as the law assumed they could not act with prudence and discretion, should not be invoked to aid them in the perpetration of gross fraud, and to wrong the innocent and confiding.

Not a few have been of the opinion that a man, who, by representing himself as competent to contract, and on the faith of such representations does contract and obtain a benefit to himself, which he retains, should not be allowed afterwards, when that contract is sought to be enforced against him, to set up and allege that he had no legal power to make the contract, and therefore he was not liable on it. Common honesty and fair dealing among men would seem to require that he should be estopped from setting up such a defence.

It is certainly the duty of Courts not to aid such defences, when their countenance can be withheld without doing violence to established principles of law. If we find that the rules of law, as expounded by the Courts and learned authors, will sustain us in overruling such a defence, we should not be slow in following their leadings. We have seen by the earlier cases that to bind a bankrupt or infant there must be proven a precise and positive promise to pay the particular debt, after the discharge, or after attaining full age, and the reason assigned was,

that in such cases they were discharged from their liabilities, or were never subject to answer. This was certainly so as to the bankrupts, and undoubtedly so as to the infant, if his contract was void. He had no capacity to make it, and his state of infancy discharged him therefrom, or made it no contract. In both cases the debts were in the eye of the law as though they had never been, and therefore the Court in this respect required proof equivalent to a new contract to make them binding.

But it has been found, on a more careful examination of the cases, the later ones especially, that the contracts of an infant were not void, but only voidable, and therefore the ground was changed, and a different element was thrown in; and the Courts have adopted the more sound and sensible rule, that ratification or confirmation of the contract made in infancy will bind the party if done after his coming of age. This new promise, positive and precise, equivalent to a new contract, is not now essential; but a ratification or confirmation of what was done during the minority is sufficient to make the contract obligatory. These words, ratify or confirm, necessarily import that there was something in existence to which the ratification or confirmation could attach, entirely ignoring, therefore, the notion that an infant's obligations or contracts were discharged or extinguished by reason of this state of infancy. And it was said in the case of *Whitney v. Dutch*, *supra*, that the terms of the ratification need not be such as to import a direct promise to pay. All that is necessary is that the infant, after attaining his majority, should expressly agree to ratify his contract by words, oral or in writing, or by acts which import a recognition and a confirmation of his promise. In *Goodsell v. Myers*, *supra*, SAVAGE, Ch. J., said: "A ratification of an infant's contract should be something more than a mere admission *to a stranger* that such a contract existed; there should be a promise to a party in interest or to his agent, or at least an explicit admission of *an existing liability*, from which a promise is implied." This rule is affirmed in *Delano v. Blake*, *supra*. In the case of *The Merchants' Fire Ins. Co. v. Grant*, 2 Edw. 544, the Vice-Chancellor held, that a provision in a will, made after attaining full age, directing "all his just debts

and personal expenses to be first paid and satisfied," was a confirmation of a mortgage given by the testator while an infant.

In *Bigelow v. Granniss*, 2 Hill, 120, the Court says: "In the case of infancy, there must be a new promise, or a ratification of the contract, after the defendant has attained the age of twenty-one years, and so in the cases of contract. The minds of the parties must meet. A promise to a stranger will not answer."

The same rule is recognized in *Watkins v. Stevens*, 4 Barb. 168.

I think that the course of decision in this State authorizes us to assume that the narrow and stringent rule, formerly enunciated, that to establish the contract, when made in infancy, there must be a precise and positive promise to pay the particular debt, after attaining majority, is not sustained by the more modern decisions. A brief reference to the course of legislation and decisions in England of a more modern date, will illustrate and confirm these views. In 1828 an Act was passed, called LORD TENTERDEN'S Act (9 Geo. IV., ch. 14), having reference to the acts necessary to be done to revive and give full force to the contracts barred by the Statute of Limitations and the contracts of infants.

A statute had been passed in 6 Geo. IV. (65 Stat. at Large, p. 46), in reference to bankrupts, the 131st section of which declares that no bankrupt, after his discharge, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged, upon any contract, promise, or agreement made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, and signed by the bankrupt or some person authorized by him.

The first section of the act of 9 Geo. IV. declares that, to take a debt or simple contract out of the operation of the statute of limitations, no acknowledgment or promise by words orally shall be deemed sufficient evidence of a new or continuing contract, and to make it operative such acknowledgment or promise shall be in writing, signed by the party to be charged thereby.

And section 5th enacts, that no action shall be maintained

whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, *or upon any ratification, after full age, of any promise or simple contract*, made during infancy, unless such promise or ratification shall be in writing, to be signed by the party to be charged thereby. The framers of this Act make the same distinction as the Courts in this State, viz.: a promise to pay, and a ratification of a promise or of the contract; the only difference now being that in England such promise or ratification must by this statute be in writing, while with us it may rest in parol or acts. The principle is the same in both countries, and the difference is only in matter of evidence.

In *Hartley v. Wharton*, 11 Adol. & Ellis, 934, an infant was held to have ratified a contract for the purchase of goods sold and delivered to him during infancy, by a letter or paper, which was given to the agent of the plaintiff when he called and demanded payment of the debt.

He made no other answer, and the paper had no address. It was in these words: "Sir, I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time. Yours respectfully, Frederick Wharton." LORD DENMAN, Ch. J., says, the effective words in the act are, "promise" and "ratification." The mischief to be provided against was, not the want of particularity as to the sum, but looseness of proof as to the fact of acknowledgment, and the defendant was held to have ratified the contract.

Harris v. Wall, 1 Exch. 122, is an important case, and deserves careful consideration. It was an action of assumpsit by indorsee against the acceptor of a bill of exchange, dated 29th March, 1845, for the sum of £500. Defendant plead that, at the time of making the promise, etc., he was an infant, under the age of twenty-one years. Replication, that before the commencement of the suit, and after he attained his full age of twenty-one years, he, the defendant, by a certain memorandum signed by him, ratified and confirmed the said contracts and promises, and then promised the plaintiff to pay him the moneys mentioned in the declaration. It appeared that there was another acceptance of the defendant for £1500, but by

whom held does not distinctly appear, though little doubt can exist it was by the plaintiff. It was proven that the defendant attained his full age on the 10th of December, 1845. The ratification and confirmation were sought to be made out by letters, addressed to the plaintiff, and written and signed by the defendant. The first, dated January 2, 1846, was in these words: "Mr. Harris: I should feel particularly obliged if you would arrange to keep the bills back for a little time, as my late brother's executors have lost their mother and only sister lately, and which prevents them from settling with you. The money will shortly be paid, say £2000. I have heard from Mr. Burnett this morning, and he tells me a Mr. Green has written to him for the money. Please arrange with him, and write to me by return." It is stated that the executors of defendant's brother, referred to in the foregoing letter, were the Messrs. Hall mentioned in defendant's letter of January 19, 1846. The defendant's brother had died in February, 1845, and had left him a considerable fortune, more than ample for the payment of the £2000. When the bills became due they were dishonored, and the defendant shortly thereafter wrote the plaintiff as follows, under date of January 6, 1846: "The bills drawn out by Mr. Burnett and me, and my acceptances, one for £1500, and the other for £500, due on the first of January last, will most likely be settled shortly, and would have been settled before, had not a sudden accident occurred, which prevented their being paid." On the 19th of January, 1846, the defendant addressed the plaintiff this letter: "Sir: I beg to inform you that I have this day forwarded your letter to Messrs. Hall, and also the letters from Messrs. Green and Burnett. I cannot exactly tell you about what time they will be settled, as I have not the money myself, and, as I have told you before, have left it entirely in their hands." On the 25th of January, 1846, he again addressed the plaintiff this letter: "Sir: I received your letter of yesterday, and am sorry to find that you are not contented with the letter I gave you when at my house some short time ago. I have heard from the Messrs. Hall yesterday, and they said they had written to their agents in Dublin to arrange the whole thing. I therefore beg you will immediately see and inform Mr. Lazarus, who I heard from this day, of it. It

is not a bit of use writing these sort of letters, as payment will not be made the sooner for them. What I tell you is perfectly correct, and the matter will be settled shortly." ROLFE, B., in delivering the opinion of the Court, says: "The question is, whether, from all or any of these letters, the Court can say that the defendant ratified the promise made during his infancy to pay the £500 bill. There is some difficulty, in cases like the present, in understanding clearly what is meant by a ratification. . . . But, whatever difficulty may exist, the case clearly recognizes ratification as something distinct from a new promise. Indeed, LORD TENTERDEN's Act (9 Geo. IV., ch. 14), which was cited in the argument before us, expressly makes a distinction between a new promise and the ratification, after majority, of the old promise, made during minority, in both cases requiring a written instrument signed by the party. The first step, therefore, to take towards a decision of this case, is to understand clearly what is meant by a ratification, as distinguished from a new promise. We are of opinion (from LORD TENTERDEN's Act) that *any act or declaration* which recognizes the existence of the promise as binding, is a ratification of it. As in the case of agency, anything which recognizes as binding an act done by an agent, or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party, which, in case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant, who has attained his majority, amount to a ratification. Applying this test to the case now before us, we think it clear that there has been a ratification. There cannot, we think, be a doubt but that if the bill in question, instead of having been accepted by an infant, had been accepted by A B on behalf of the defendant, being an adult, the letter in question would have amounted to an adoption of the agency of A B, and that the defendant would have been liable. And he must, on the same ground, be liable in the present case. He in truth treats his own act during infancy as having been done on behalf of himself, after his majority. Our decision is thus conformable to that of the Queen's Bench, in *Hartley v. Wharton*, where, however, the letter of ratification was certainly stronger than the letters now before us. We should have had great

difficulty in holding that the letters of the present defendant were such as to amount to another promise; but, according to the meaning we have attributed to the word ratification, we think that the plaintiff has made out his ratification, and is therefore entitled to judgment."

We have quoted thus liberally from this case, because, we think, it states with clearness and accuracy the rules and principles applicable to cases of this character, and such as have been recognized and affirmed in our own Courts.

The legislation and adjudication in England have clearly defined what is to be done, in the three classes of cases under consideration, to revive and make effective debts and contracts of infants, bankrupts, or those barred by the Statute of Limitations. In the latter case, they are revived and restored to their original vigor by an acknowledgment or promise; in the case of infants, by a new promise or ratification of the acts done in infancy, after attaining full age; and in the case of a bankrupt, by a new promise, contract, or agreement made after the discharge.

It may be conceded that the paper produced in evidence by the defendant, for want of a seal, could not operate as a deed and valid conveyance of the land therein mentioned. But clearly the defendant could have availed himself of it as a contract of sale of those lands, and have enforced a specific performance of it by a valid and effectual conveyance. All that the Statute of Fraud requires is, that a contract of sale of lands shall be in writing, and that such writing express the consideration and be subscribed by the party by whom the sale is to be made, or by his agent lawfully authorized. The evidence of the authority may be by parol. Neither a written authority nor an authority under seal is required: *Worrall v. Munn*, 1 Seld. 229; 2 R. S. 135, §§ 8, 9; 10 Paige, 386; 5 Hill, 107. But in the present case, the authority of the agent cannot be questioned. In the first place the principal, the present plaintiff, has fully ratified the act of his agent in making the sale. The commencement of this suit to recover the balance of the purchase-money, is a full and complete ratification of the sale by the agent to this defendant. Again, the plaintiff offered on the trial to show by the agent that he was author-

ized by the plaintiff to sell this land for him, and did so sell it; that he had a power of attorney from the plaintiff to sell and convey the lots, and that as such attorney he made and executed a quit-claim deed to the defendant of the lots. This testimony, which was taken on commission, was offered by the plaintiff and objected to, and excluded by the Court as immaterial, and to which the plaintiff excepted. The defendant accepted the deed as made out and executed by the agent, and went into possession under it, and, we are authorized to assume, as these facts were offered to be proved, actually sold and conveyed away a portion of the premises, and the defendant must be regarded as having acquired at least an equitable title to the lands: *Worrall v. Munn*, *supra*; *Delano v. Blake*, 11 Wend. 85; *Roof v. Stafford*, 7 Cow. 179; *Palmer v. Miller*, 25 Barb. 399; *Jones v. Phenix Bank*, 4 Seld. 234; *Am. Lead. Cas.* 258. In *Delano v. Blake*, *supra*, the Court, by Judge NELSON, says: "The purchase by an infant of real estate is voidable, but it vests in him the freehold until he disagrees to it, and the continuance in possession after he arrives of age is an implied confirmation of the contract." So as to a lease to an infant, the continuance in possession, after the party arrives of age, is a confirmation, and he must pay the rent: *Bac. Ab.*, tit. *Infant*, 611, 612.

The infant in this case certainly acquired an equitable title to the real estate purchased of the plaintiff.

He went into the possession and continued in possession after he attained the age of twenty-one, and bargained and sold a portion of the real estate, and received the consideration therefor. And these circumstances must be regarded as affording the strongest evidence of his having affirmed the purchase, and his consequent liability upon the note in suit. When an infant purchases property, and continues to enjoy the use of the same, and then sells it, or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract, and he cannot afterwards avoid payment of the consideration: *Boody v. McKenney*, 10 Shep. 517; *Lawson v. Lovejoy & Green*, 405; *Bryden v. Bryden*, 9 Metc. 519. In this last case, Chief Justice SHAW observes, that if the infant, after coming of age, retains the property purchased by him during his minority, for

his own use, or sells or otherwise disposes of it, such detention, use, or disposition, which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own, is evidence of an intention to affirm the contract, from which a ratification may be inferred, when he purchases land and goes into possession, and continues in possession after his arrival at full age, for he thereby affirms the purchase and ratifies the contract of sale: *Hubbard v. Cummings*, 1 Greenl. 11; *Boody v. McKenney*, *supra*; *Robbins v. Eaton*, 10 N. H. 561; Pars. on Cont. 271.

In *Hubbard v. Cummings*, *supra*, Chief Justice Mellen said, we have seen that the infant continued in possession of the lands until he sold to Cummings, and until after his arrival at full age. If an infant make an agreement and receive interest upon it after he is of full age, he confirms the agreement (citing 1 Verm. 132). Or if he make an exchange of land, and after he is of full age continues in possession of the land received in exchange: 2 Verm. 225. So if he purchase lands while under age, and continue in possession after he arrives at full age, it is an affirmation of the contract: Co. Lit. 3a; 3 Com. Dig., *Enfant C.* 6; 2 Bulstr. 69; 2 Vent. 203; 3 Burr. 1710. On this point, says the Chief Justice, the authorities seem clear and decisive; the law is plain as the fact. In *Robbins v. Eaton*, *supra*, the Court say, some authorities confine an affirmation of a purchase of land to an actual subsequent sale of the same by the infant after he becomes of age; but it seems to be limiting to a very narrow point the evidence of affirmation of such a contract, and without any sufficient reason, as many other acts may constitute just as full and undoubted evidence of a design on the part of the infant to affirm such contract as an actual sale of the land. The Court thinks the better authority to be that if the grantee, being an infant, continues in possession of the land after becoming of full age, this is an affirmance of the contract. In the case at bar the ratification was attempted to be shown by the facts, that the infant continued in possession after full age, and sold a portion of the premises, and received the consideration therefor. Within all the cases these acts amount to an unequivocal rati-

fication of the contract of purchase by the infant, and settle conclusively his liability for the purchase-money. Another principle is firmly established by the cases, namely, that the infant on attaining full age cannot hold on to the purchase and thus affirm that, and plead his infancy to avoid the payment of the purchase-money: *Kline v. Beall*, 6 Conn. 494; *Bigelow v. Kinny*, 3 Verm. 353; 4 Bacon Ab. 376; *Cheshire v. Barrett*, 4 McCord Law Rep. 241; *Lynde v. Budd*, 2 Paige, 191; *Kitchen v. Lee*, 11 Id. 107; *Deason v. Boyd*, 1 Dana, 45; *Badger v. Phinney*, 15 Mass. 359.

In *Dana v. Coombs*, *supra*, the Court say, had the suit been upon notes given for the purchase-money of land, and the defendant had set up the defence of infancy, it might well have been assumed that they were given as part of the consideration of the purchase of lands, which the tenant at full age chose to retain. In *Cheshire v. Barrett*, *supra*, the Court say, a very slight circumstance demonstrating his assent, will bind an infant, or any act by which his assent is manifested. Thus, if an infant purchase land and continue in possession, after he attains full age, it will be regarded as a confirmation of the purchase, citing cases. In *Lynde v. Budd*, *supra*, Chancellor WALWORTH held that an infant who had purchased land, by continuing in possession after he became twenty-one years of age, and conveying the land, affirmed the whole bargain and made himself legally liable for the payment of the residue of the purchase-money. And in *Kitchen v. Lee*, *supra*, the same learned Judge declared the rule of law to be, that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he received it.

It is therefore entirely clear upon all the authorities that the acts of the defendant, after he attained full age, were a ratification and confirmation of the contract of purchase, so as to render him liable to pay the purchase-money. The defendant set up in his answer, but did not prove, any failure of the consideration of the note. The only ground of defence set forth in his answer, proved and relied upon on the trial, was that of infancy. It has been seen that that is unavailing to him.

It is now urged that as the deed of the plaintiff was not under seal, no valid title was conveyed to the defendant, and that therefore he has ratified or confirmed nothing. Several answers to these objections present themselves. In the first place, we have seen that the paper produced, if not valid as a deed, is as a contract for the sale of lands. It stated the consideration, the thing sold, and is signed by the party to be charged thereby, or his lawful agent. If the defendant has not got such a deed as he was entitled to under his contract, he can compel the plaintiff to give him one upon the payment of the purchase-money. He could have asked by his answer that such a deed be given, and it could have been provided for in the judgment in this action. It was the contract of purchase which the defendant has ratified and confirmed, by such unequivocal acts as make it binding and obligatory upon him, and subjects him to the payment of the purchase-money.

The judgment should therefore be reversed, and a new trial ordered; costs to abide the event.

DAVIS, J. The note in suit was given by defendant, for the purchase price of lands situate in Nebraska Territory, on the 6th day of January, 1857. The defendant became of age on the 25th day of February following. At the time of receiving the note, the plaintiff, by his attorney, executed to defendant an instrument which, in form, purported to be a conveyance of the lands sold, but it was *without seal*, and, for that reason, invalid at common law as a conveyance of the title to real estate. No proof of the validity of this instrument, as a grant, under the law of Nebraska, was given on the trial. The legal presumption was, therefore, that the common law prevailed in that Territory, and that it was the same as the common law of this State: *Holmes v. Broughton*, 10 Wend. 75; *Starr v. Peck*, 1 Hill, 353; 15 N. Y. 353; 2 How. 201.

In answer to the defence of infancy, the plaintiff offered, in substance, to show that the defendant took possession of the lands under the instrument above mentioned, and, after he became of age, sold a portion of them to one Perry, for the sum of \$100, and executed to him what is called in the offer "a

deed not under seal," which, it may be assumed, was an instrument like that executed to defendant by plaintiff. This was objected to by defendant, on the ground that he obtained no title by the paper he received ; and on that ground the evidence was rejected by the Court.

The fact of defendant's infancy at the time he gave the note having been established, it was incumbent upon the plaintiff, and competent for him, to show a ratification of the transaction by defendant after he attained his majority. The rejected offer was made with that view. The Court below has sustained the ruling at Circuit, on the assumption that "the defendant never acquired any title to the land for which he gave the note, and that he never conveyed any title to another to any part of it." It is not asserted that, if the legal title had passed to the defendant by the instrument, his entering into possession and sale of a part of the land after he became of age would not have ratified his contract with plaintiff, and given validity to the note: *Hubbard v. Cummings*, 1 Greenl. 11; *Robbins v. Eaton*, 10 N. H. 561; 1 Pars. on Cont. 271.

It seems to me the Court below overlooked the true question on the subject of ratification. Conceding that the instrument, for want of a seal, passed no legal title in the lands to the infant, did it not transfer to him a valuable equitable interest, which he could enforce and maintain against the plaintiff? Failing as a deed, it contains sufficient to constitute it a contract of purchase and sale between the parties, and it contains an agreement of warranty by which plaintiff undertakes "to warrant and defend the above property against the lawful claims of all persons whomsoever," with a specific exception. The fact that it is executed by but one of the parties is no objection to its validity as a contract. In *Worrall v. Munn*, 1 Seld. 229, it was held by the Court that such a contract "can be enforced either at law or in equity against the vendor, and wanting mutuality is no defence." It is upon sufficient consideration; and the offer was to show that the defendant entered into possession of the land under it. Under such a state of facts the rights of the infant under the contract would, in the Courts of the State, be very clear. Upon the basis of this instrument

and his possession under it, he could, on attaining his majority, have elected to enforce his equities by compelling the plaintiff to execute a proper conveyance; and I can conceive of no defence the plaintiff could have made, beyond, perhaps, the protection of payment of the consideration money, which the Court would have given him. Who can doubt that on discovery by a vendee that a supposed deed of his property, of which he has taken possession and for which he has paid or secured the consideration, is defective for want of a seal, he may call on his supposed grantor to execute a perfect conveyance, and enforce his call by suit, if the vendor unjustly refuse? When the defendant became of age, he was under no obligation to have taken that course. The instrument as to him was voidable, and he might undoubtedly have avoided it, abandoned the possession of the lands and repudiated his note. He did not elect to do so. On the contrary, if the offer be true, he retained the possession, several months afterward sold a portion of the lands to a third party for \$100, and executed to him a supposed conveyance, but without a seal. It is essential to the rights of that party, as well as of the defendant, that this should be regarded as a ratification. As to him, the defendant has no defence of infancy to interpose; and unquestionably that person has acquired by his purchase all the rights in the parcel sold that defendant had under his contract with plaintiff. But it is enough for this case to say that the evidence offered tended to show a ratification; for it showed that defendant, after he became twenty-one, elected to deal with the property as his own, and to dispose of it accordingly. I am clearly of opinion that the evidence offered should have been received. The objection that the authority of the plaintiff's agent who executed the instrument was not shown, was of no force. The plaintiff was by the very suit affirming the authority, by offering the supposed deed as his own, and by claiming and enforcing the note given for the consideration. And, under such circumstances, it was not necessary he should give evidence of the actual authority of his agent to make the instrument at the time it was made. Besides, the case passed off altogether on the other ground; and if the Court had intimated an adverse

opinion on this point, the plaintiff could doubtless have readily cured it by calling himself the agent and a witness.

In my opinion, the judgment should be reversed and a new trial granted, with costs to abide the event.

All the Judges concurring,
Judgment reversed.

Carthy v. Nicrosi, 72 Ala. 332 ; Walsh v. Flinn, 43 N. Y. 23 ; Irvine v. Irvine, 9 Wall. 617-27.

The promise must be *express*, not *implied*.

Hale v. Gerrish, 8 N. H. 374 ; Ford v. Phillips, 1 Pick. 202 ; Thompson v. Lay, 4 Id. 48.

REAL PROPERTY.

VOIDABLE CONVEYANCES DISAFFIRMED.

Conveyances made and executed by an infant can be avoided or disaffirmed by him *after he has reached his majority*, but not before.

WELCH v. BUNCE.

Supreme Court of Indiana, 1882.

83 Ind. 382.

Howk, J. In this case the appellees, the plaintiffs below, sued the appellant as defendant, in a complaint of a single paragraph, of which the following is a copy:—

“Comes now Nancy Bunce, by her next friend, Samuel Bunce, and Samuel Bunce, and complaining of the defendant says: That on the 22d day of January, 1878, she was the owner of the following real estate in Huntington County, Indiana, to wit: Commencing at a stone in the center of the west line of Reserve No. 51, township twenty-nine (29) north, range ten (10) east, running thence north forty-five degrees east, thirteen and fifty hundredths ($13\frac{50}{100}$) chains; thence south forty degrees east twenty-nine and $\frac{20}{100}$ chains, to the center of the road; thence south along the center of the road seventeen and forty-five hundredths ($17\frac{45}{100}$) chains, to the south corner of said reserve; thence north forty-five degrees west forty and $\frac{14}{100}$ chains, to the place of beginning, containing forty-six and eighty one-hundredths acres of land, which was her sole and separate estate, having been inherited by her from her deceased father, Andrew Branstrator; that on said day plaintiff and her husband, Samuel Bunce, joining with her, made a conveyance of said real estate to defendant, and delivered said deed to said grantee; that at the time of executing said conveyance this plaintiff was a minor, under the age of twenty-one years, and is yet; that on the 25th day of October, 1879, she repudiated

and disaffirmed said conveyance; that said conveyance was duly recorded in deed record book 41, page 313, of the records of Huntington county, on the first day of May, 1879; that said Samuel Bunce is the husband of said Nancy Bunce; wherefore she asks that said deed be set aside, and the title to said land be quieted in her, and for possession of the property in suit, to preserve the rents and profits, costs, and all proper relief."

To this complaint the appellant demurred upon the following grounds of objection: "1. The complaint does not state facts sufficiently to constitute a good cause of action; and, 2. Defect of parties plaintiffs; Samuel Bunce is joined with his wife." This demurrer was overruled by the Court, and to this ruling the appellant excepted and refused to plead further. Thereupon the Court rendered judgment for the appellee Nancy Bunce, as prayed for in the complaint.

In this Court the appellant has assigned as errors the following decisions of the Circuit Court:

1. In overruling his demurrer to appellees' complaint; and,
2. In overruling his motion to require the appellees to substitute a responsible next friend, or to remove Samuel Bunce as such next friend, on the showing made by the appellant.

Under the first of these alleged errors the principal question presented for decision is this: Can an infant disaffirm his or her conveyance of real estate during infancy, or before he or she arrives at the full and lawful age of twenty-one years? This action was commenced on the 3d day of November, 1879; and it was alleged in the complaint then filed that the appellee Nancy Bunce was then "a minor, under the age of twenty-one years," and that she had disaffirmed her conveyance of the real estate to the appellant, on the 25th day of October, 1879, preceding the commencement of this suit. It is clear, therefore, that the question above stated is fairly presented for decision by the demurrer to the complaint. We are of the opinion that the question stated must be answered in the negative. It would seem to be settled by the decisions of this Court, that an infant can not disaffirm or avoid his or her conveyance of real estate, simply on the ground of infancy, which is the only ground relied upon in the case at bar, until his or her arrival at majority: *Chapman v. Chapman*, 13 Ind. 396; *Miles v. Linger*man, 24 Id. 375; *Law v. Long*, 41 Id. 586.

The appellees' counsel, as we understand their argument, concede that the rule of law, on the subject under consideration, formerly was as we have stated it. But counsel claim that this rule was changed by the provisions of section 10 of the civil code of 1852, and that this section has been overlooked by this Court in its more recent decisions on the subject of the rule. This section 10 provides as follows: "When an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age:" 2 R. S. 1876, p. 37; section 12, Civil Code of 1881; section 255, R. S. 1881.

We are of the opinion, however, that the section quoted has no application to the question under consideration, and, therefore, makes no change in the rule of law in relation thereto. An infant has no right of action as to lands conveyed away by him or her, simply on the ground of infancy, until such conveyance has been disaffirmed or avoided. An infant's conveyance of real estate is not void, but is merely voidable; and it can not be avoided or disaffirmed, simply on the score of infancy, until the infant has arrived at majority. It seems to us, therefore, that the facts stated in the complaint, in the case now before us, showed clearly that the appellee Nancy Bunce had no right or cause of action against the appellant, at the commencement of this suit, and that the demurrer to the complaint, for the want of sufficient facts, ought to have been sustained.

Some other points, of minor importance, are noticed, rather than discussed, by the appellant's counsel. We deem it unnecessary for us to consider or decide these points, as the judgment must be reversed for the reasons already given.

The judgment is reversed, with costs, and the cause is remanded with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Irvine v. Irvine, 5 Minn. 61; Hastings v. Dollarhide, 24 Cal. 195; Boseman v. Browning, 31 Ark. 363; Bool v. Mix, 17 Wend. 119; McCormic v. Leggett, 8 Jones, N. C. 425; Stafford v. Roof, 9 Cowen, 626; 3 Washburn on R. P. 265.

It is claimed that on *principle* the infant should be allowed to disaffirm *before* as well as *after* majority.

Bishop on Contracts, sec. 938; see, also, 2 Kent's Comm. 237.

The reason of the rule seems to be that the infant is protected by his right to re-enter and enjoy the rents and profits before his majority.

Conveyances made and executed to an infant may be disaffirmed by him *after* reaching *his majority*, but not before.

BAKER v. KENNETT.

Supreme Court of Missouri, 1878.

54 Mo. 82.

WAGNER, J. This was an action on a promissory note executed by the defendant on the 1st day of May, 1872, in favor of the plaintiff for the sum of eight thousand dollars.

The record discloses these facts: That at the time the note was made and executed the plaintiff was the owner of a tract of land in Jefferson County, and the defendant, Press. G. Kennett, then a minor under the age of twenty-one, was desirous of purchasing the same. The parties finally came to an agreement, and the price was fixed at eight thousand dollars; plaintiff making to the defendant, Kennett, a deed for premises, and he executing the note sued on, due and payable seven months after date, with ten per cent. interest from the date thereof, with his mother and sister signing the note as his sureties. The evidence clearly shows that the land was not worth the sum agreed to be paid for it. Kennett took possession of the same, making considerable improvements thereon, and on the 15th day of Sept. 1872, whilst he was still an infant, he went to the plaintiff and demanded back his note, offering to re-convey the land and pay the interest due on the note. Shortly after his majority he offered to pay two thousand dollars, and re-convey the property to plaintiff, and give him the improvements that he had put upon the premises, but this offer was refused. When Kennett made this last offer, plaintiff told him that Mr. Jamison had the note, and proposed that he should go to Jamison and pay the \$2000, and have it credited upon the note, but this proposition Kennett declined. Mr. Jamison is a lawyer, and a member of the firm of Cline, Jamison & Day, and there is a conflict of the testimony here between the plaintiff and defendant.

Kennett says that at that time plaintiff told him that he had sold the note to Jamison, and that he was ignorant that Jamison was a lawyer, whilst the plaintiff swears that he told him that Jamison was his lawyer, and that he had placed the note in his hands for collection.

On Nov. 10, 1872, Kennett attained his majority, and he abandoned the premises, leaving a man there to take care of them, saying that there would be a lawsuit about them, and that the tenant should keep them for whoever became ultimately entitled to them.

Suit was brought on the note March 11, 1873, and two letters were introduced on the trial written by the defendant, Kennett, to Cline, Jamison & Day, dated respectively in Dec. 1872, and Feb. 1873, in which he recognizes the debt, and makes propositions in reference to its payment.

These letters, however, he alleges, were written whilst he was under the impression that the note had passed into the hands of an innocent purchaser before maturity, and after he had taken the advice of counsel, who informed him that he could make no defence to the note.

At the trial a deed was exhibited and tendered to the plaintiff reconveying the premises to him, but its acceptance was refused.

After hearing the evidence, the Court below gave judgment for the plaintiff, and the defendant has prosecuted an appeal to this Court.

The old distinction between the void and voidable contracts of infants is becoming exploded by the Courts, and the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election when they become of age, either to affirm or disavow them: *Townsend Adm'r v. Cox*, 45 Mo. 401; 2 Kent's Com. [10th Ed.], 268, and cases cited.

If an infant would disaffirm his contract and recover back his property, either real or personal, he must refund what he has received. There can be no right of recovery as long as any part of the consideration is withheld: *Kerr v. Bell*, 44 Mo. 120; *Highley v. Barron*, 49 Id. 103.

In cases of sales of land the general doctrine seems now to be that the infant cannot conclusively avoid the conveyance till he arrives at age: *Schneider v. Staihr*, 20 Mo. 269; 1 Am. Lead. Cas. [5th Ed.], 817; *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 120.

Leases and conveyances to infants form no exception to the prevailing rule—they are not void, but only voidable: *Griffith v. Schwenderman*, 27 Mo. 412; *Irvine v. Irvine*, 9 Wall. 617.

In the case of *Irvine v. Irvine*, *supra*, the Court lays down the rule that it is not necessary to the affirmation of an infant's voidable deed that there be an affirmance by him after he comes of age, as solemn in character as the original act itself, still mere acquiescence without anything else is not generally sufficient evidence of affirmance. But any ratification or affirmance of a clear and unequivocal character, showing an intention to affirm deed, is, however, enough.

Something must be done by which it is plainly manifested that the infant intends to confirm or ratify, as in the case of *Ferguson v. Bell* (17 Mo. 847), where the infant executed a deed, and after coming of age expressed satisfaction with her bargain, received part of the purchase-money, and spoke of her intention to make a confirmatory deed, but died suddenly without having done so. This was held a sufficient ratification.

In *Clamorgan v. Lane*, 9 Mo. 446, Louis Clamorgan, whilst an infant, had sold and deeded certain property to Dr. Lane. At the time when he arrived of age he went to the office of the attorney of Dr. Lane, who had sent for him with a view to procure a confirmation of his previous deed by the execution of another which had been prepared for that purpose. When asked to execute this deed of confirmation, Louis said he was perfectly willing; that the land was Dr. Lane's, and that he would execute a deed as soon as he was of age, but finally declined executing the deed which had been prepared because of certain covenants contained therein, and the whole matter was deferred till a subsequent day, by which time it was supposed an interview would be had with Dr. Lane, and another deed prepared conformably to Louis's views. Upon these facts the Court decided that the mere declarations, or promise, of Louis

upon a contingency to make a deed of affirmance did not amount to affirming the deed.

In the opinion it is said: "So far from confirming the deed of August, it would seem that he expressly declined doing so at the time, and though he used some general expressions that the land was Dr. Lane's, yet such expressions, taken in connection with his acts, cannot amount to a present confirmation, but only indicate a disposition to confirm at some future time and on stipulated conditions. From the statements and acts of Dr. Lane's agent, Louis must have inferred that a deed was necessary to a confirmation, and the execution of a deed he deliberately postponed."

Where the infant makes a conveyance of real estate, his mere failure for years to disaffirm affords no proof of a ratification. There must be some clear or positive act performed for that purpose.

The reason is plain enough. By his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. But where he has purchased or taken a lease to real estate, the case is different. There, if he wishes to rescind or disaffirm, he must do so in a reasonable time.

In speaking on this subject, the Supreme Court of Maine, in *Boody v. McKenney*, 23 Me. 517, says: When during infancy he has purchased real estate, or taken a lease of it subject to the payment of rent, or has granted a lease of it upon payment of a rent, in such cases it is obvious, when he becomes of age, that he is under a necessity, or that common justice imposes it upon him as a duty, to make his election within a reasonable time. He cannot enjoy the estate after he becomes of age for years, and then disaffirm the purchase and refuse to pay for it, or claim the consideration paid, or thus enjoy the leased estate, and then avoid the payment of the stipulated rent, or receive rent on the lease granted and then disaffirm the lease. When he will receive a benefit by silent acquiescence, he must make his election within a reasonable time after he arrives at full age, or the benefits so received will be satisfactory proof of a ratification: *Ketsey's Case*, Cro. Jac. 320; *Evelyn v. Chichester*, 8 Burr, 1765; *Hubbard v. Cummings*, 1 Maine, 11; *Dana v.*

Coombs, 6 Id. 89 ; Barnaby v. Barnaby, 1 Pick. 221 ; Kline v. Beebe, 6 Conn. 494.

So in *Robbins v. Eaton*, 10 N. H. 561, it was held, that where an infant purchased land, and continued in possession, occupying and improving the same for some years after arriving of age, and had offered to sell the land, it amounted to a ratification of the original purchase.

And in *Bigelow v. Kinney*, 8 Vt. 353, where an infant, a short time before he became of age, purchased land, and executed his notes and a mortgage to secure the purchase-money, and, two days afterwards, in consideration of the notes being given up to him, executed a quit-claim deed of the premises to the person of whom he had purchased, who went immediately in possession, and he and his grantees remained in possession several years before the infant intimated any intention to disaffirm the contract, it was held in an action of ejectment, brought by the infant after having arrived at full age against the person in possession, that he could not affirm the deed which conveyed the land to him and avoid the mortgage executed by him to secure the consideration-money ; and that, as the quit-claim deed was voidable only by the infant on his coming of age, he ought, if he meant to avoid it, to have given notice of disaffirmance, or otherwise have rejected the contract within a reasonable time after he became of age, and not having done so, he was presumed to have affirmed the quit-claim deed, and, therefore, was not entitled to recover.

Tested by these principles there can be no objection as to the reasonableness of the time in which the defendant disaffirmed the contract. He attempted to do so before he was of age, but in a few days thereafter he tried to rescind the contract, and, upon the refusal of the plaintiff, offered to give him two thousand dollars by way of compromise, and also to include the improvements. But further, he did not remain on the place using it for his own purposes and benefit, but abandoned it and left it in a position for the plaintiff to occupy at any time he saw fit or proper to do so.

The disaffirmance was speedily made, and in the most positive and unequivocal manner. It is impossible then to hold the defendant bound by the contract, unless the letters written

in December and February be construed to amount to a ratification. The letters acknowledged the liability, and proposed paying the note in instalments. This proposition was not accepted.

It is doubtful, according to the rule laid down in *Clamorgan v. Lane*, whether the letters really did affirm and ratify the transaction. Whilst the defendant spoke of the note as an existing obligation, he appeared to be willing to pay under certain circumstances, but whether that was equivalent to a present confirmation may at least be considered questionable.

The rule, however, is well settled that to constitute a ratification of an infant's contract, a mere acknowledgment that the debt existed, or that the contract was made, is not sufficient. There need not be a precise and formal promise; but there must be a direct and express confirmation, and a substantial promise to pay the debt or fulfil the contract. The promise must be made with a knowledge of the facts, with a deliberate purpose of assuming a liability from which he knows he is discharged by law: 1 Pars. Cont. 823; *Highley v. Barron*, 49 Mo. 103.

In the present case the defendant swears, and there is nothing to contradict his testimony, that he wrote the letters from which the promise is sought to be deduced under a mistake of facts—under a misapprehension of his liability; that he supposed and believed that the note had been negotiated before maturity, and that he was advised that he could make no defence to it. If this was so, then most assuredly the promise contained in the letters constituted no affirmance or ratification.

He did not act with a deliberate knowledge of the facts. He was wrongly led to suppose that he was liable, when in truth he was discharged. But it is contended that although the infant may not be bound, the sureties are nevertheless liable.

As a general proposition it is undoubtedly correct that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertakings. But the cases in which this principle has been decided are clearly distinguishable from the present one. Here the undertaking of the sureties goes to the whole consideration.

Story says, "that a subsequent failure of consideration is equally fatal with an original want of consideration, and if a bill is given as an indemnity, it is sufficient answer to it that the party has not been indemnified at all, or that the original claim has been extinguished:" Story, Bills, § 184.

By the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished.

It would be a strange doctrine which would give him back his land, and allow him to recover from the sureties the purchase-money also.

The rule quoted does not apply to this case. The plaintiff contracted with an infant, knowing him to be an infant at the time, and after a rescission of the contract he obtains back again what he sold. This the law gives him, but it does not give him the property and the consideration both.

My opinion is that the judgment should be reversed. The other Judges concur, except Judge NAPTON, who did not sit.

Roberts v. Wiggin, 1 N. H. 73; Boody v. McKinney, 23 Me. 517; Walsh v. Powers, 43 N. Y. 23; Collis v. Day, 38; Wis. 643; Ellis v. Alford, 64 Miss. 8.

HOW DISAFFIRMED.

To avoid his conveyance on reaching his majority, the former infant must not only refrain from any acts of *affirmance*, but he must perform *some positive act of disaffirmance*.

DIXON v. MERRITT.

Supreme Court of Minnesota, 1875.

21 Minn. 196.

BERRY, J. The mortgage involved in this action was made September 13, 1855, by Anna E. Agnew, owner in fee simple of the premises mortgaged, and an infant *feme covert*, and Edward C. Agnew, her husband. The statute then in force,

Rev. Stat., ch. 46, § 2, provided that “a husband and wife may, by their joint deed, convey the real estate of the wife, in like manner as she might do by her separate deed, if she were unmarried.” If the wife was an infant, this statute gave to the joint deed of her and her husband the same effect, as a conveyance of her real estate, as was given to a deed executed by her as an infant *feme sole*. The better and now prevailing rule is that the deed of an infant (and an infant *feme sole* is nothing more), being an executed contract (as for instance a mortgage of real estate), is not void, but voidable at the infant’s election: 2 Kent (12th Ed.), 236–9 and note 1; *Irvine v. Irvine*, 9 Wall. 617; *State v. Plaisted*, 43 N. H. 413; *Hastings v. Dollarhide*, 24 Cal. 195; 1 Am. Lead. Cas. 248. As the mortgage above mentioned was, therefore, not void, but voidable at Mrs. Agnew’s election, it was for her, if she desired to avoid it, to signify her desire, not only by refraining from any act of affirmation, but by performing some positive act of disaffirmance. Authorities *supra*. In this case the mortgage had been so foreclosed by advertisement that, if it had not been voidable and been avoided, the foreclosure would have conferred a good title upon the purchasers. After the title of the purchasers at the foreclosure sale had become perfect (save so far as it was affected by the voidability of the mortgage), and after Mrs. Agnew had arrived at majority, and had been divorced from her husband, she conveyed the mortgaged premises to the plaintiff by a warranty deed. This deed was a sufficient disaffirmance of the mortgage, unless, by delay or otherwise, Mrs. Agnew had lost her right to disaffirm—that is to say, had affirmed or ratified the mortgage. Authorities *supra*: *Hoyle v. Stowe*, 2 Dev. & Bat. Law, 330. Whether she had lost her right, and had affirmed or ratified the mortgage, was a question of fact, or perhaps of mixed fact and law (*Irvine v. Irvine*, 9 Wall. 617; *State v. Plaisted*, 43 N. H. 413; 2 Kent, 236–9 and note 1), which, upon the findings of the Court below and the evidence reported, must be taken to have been answered in the negative, and found accordingly.

But the defence principally relied upon is that the plaintiff is estopped, by a former judgment, from setting up Mrs. Agnew’s infancy. The judgment referred to was rendered in

an action brought by Mrs. Agnew (then a *feme covert*, but not an infant), by her next friend, in which, after alleging the execution of the mortgage and its foreclosure, further facts were averred, showing, as was contended, that before the foreclosure proceedings had been commenced the mortgage had been satisfied. The relief sought was that the foreclosure might be set aside, and the mortgage ordered to be satisfied of record. Judgment was rendered dismissing the action, upon the ground (as appears from the findings in the case) that the plaintiff was not entitled to the relief sought, or to any relief in that action. The plaintiff brings the present action to determine an alleged adverse claim of defendants. This claim defendants undertake to maintain by producing the mortgage and the proof of foreclosure. Plaintiff, as privy in estate with Mrs. Agnew (*Hoyle v. Stowe*, 2 Dev. & Bat. Law, 320), attacks the mortgage, claiming that it was voidable, as having been made by Mrs. Agnew while an infant, and as having been by her disaffirmed. In effect then, in the former action, the mortgage was attacked solely on the ground that it had been satisfied, while in this action it is attacked on the ground that it was made by an infant, by whom it had been duly avoided. Without undertaking to lay down any general rule applicable to all cases, by which to determine what questions are, and what are not settled by a former adjudication, it will be sufficient, for the purposes of this case, to say that in order that a judgment in a former action should bind parties and privies, by way of estoppel, in a subsequent action, it must have directly decided a point which was material in such former action, and is in litigation in the latter: 2 Taylor on Evidence, §§ 1507, 1528; Broom's Legal Maxims, 327; *Langmead v. Maple*, 18 C. B. (N. S.) 255, 270; *Demorest v. Darg*, 32 N. Y. 281; *Burlen v. Shannon*, 99 Mass. 200; *Boileau v. Rutlin*, 2 Exch. 665; *Aurora City v. West*, 7 Wall. 82; *People v. Johnson*, 38 N. Y. 63; *Hunter v. Stewart*, 4 De Gex, F. & J. 169, 179; *Woodgate v. Fleet*, 44 N. Y. 1; *Freeman on Judgments*, § 271. Tried by this test, no argument is needed to show that the former adjudication, relied upon by the defendants, cannot be set up as a bar, by way of estoppel, to the present action.

Whether in this action, and upon the pleadings as they

stand, the parties were properly entitled, as a matter of right and of good practice, to litigate all the matters which they have litigated in fact, is a question which we need not examine, in view of the circumstances that this has been done without any objection which we are called upon to consider.

Order denying new trial affirmed.

A person on reaching his majority may *ratify* his voidable contracts by doing *nothing*, but he can *disaffirm* them only by doing *something*.

WHEN DISAFFIRMED.

A reasonable time after reaching majority is allowed a person within which to disaffirm his conveyance made while a minor, and *mere acquiescence*, unexplained, for an unreasonable time, will bar the right.

GOODNOW v. THE EMPIRE LUMBER Co.

Supreme Court of Minnesota, 1884.

31 Minn. 468.

GILFILLAN, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883. Treating this as a sufficient act of disaffirmance in case they then had the right to disaffirm,—and it is not material whether it was or not, for the bringing of the action, which was sufficient, immediately followed,—there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy

on the part of the infant grantor ceased April 21, 1868, and, as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold, and control the property, ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died she was free of the disability of infancy, and for one year four and a half months she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so; and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that, even if the period of minority of plaintiffs were to be excluded (and we doubt if it should be), there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred? Of the decided cases the majority are to the effect that he need not (where there are no circumstances other than lapse of time and silence), and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: *Vaughan v. Parr*, 20 Ark. 600; *Boody v. McKenney*, 23 Me. 517; *Davis v. Dudley*, 70 Id. 236; *Prout v. Wiley*, 28 Mich. 164; *Youse v. Norcum*, 12 Mo. 549; *Norcum v. Gaty*, 19 Id. 65; *Peterson v. Laik*, 24 Id. 541; *Baker v. Kennett*, 54 Id. 82; *Huth v. Car. Mar. Ry. & Dock Co.*, 56 Md. 202; *Hale v. Gerrish*, 8 N. H. 374; *Jackson v. Carpenter*, 11 John. 539; *Voorhies v. Voorhies*, 24 Barb. 150; *McMurray v. McMurray*, 66 N. Y. 175; *Lessee of Drake v. Ramsay*, 5 Ohio, 252; *Cresinger v. Lessee of Welsh*, 15 Id. 156; *Irvine v. Irvine*, 9 Wall. 617; *Ordinary v. Wherry*, 1 Bailey, 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following

are the principal ones: *Holmes v. Blogg*, 8 Taunt. 35; *Dublin & W. Ry. Co. v. Black*, 8 Exch. 181; *Thomasson v. Boyd*, 13 Ala. 419; *Delano v. Blake*, 11 Wend. 85; *Bostwick v. Atkins*, 3 N. Y. 53; *Chapin v. Shafer*, 49 Id. 407; *Jones v. Butler*, 30 Barb. 641; *Kline v. Beebe*, 6 Conn. 494; *Wallace v. Lewis*, 4 Harr. 75, 80; *Hastings v. Dollarhide*, 24 Cal. 195; *Scott v. Buchanan*, 11 Humph. 467; *Hartman v. Kendall*, 4 Ind. 403; *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. Boright*, 9 Id. 368; *Harris v. Cannon*, 6 Ga. 382; *Cole v. Pennoyer*, 14 Ill. 158; *Black v. Hills*, 36 Id. 376; *Robinson v. Weeks*, 56 Me. 102; *Little v. Duncan*, 9 Rich. (S. C.) Law, 55.

The rule holding certain contracts of an infant voidable (among them his conveyances of real estate), and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity so to determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the Court in *Wallace v. Lewis*, "a dangerous weapon of offence, instead of a defence." For we cannot assent to the reason in *Boody v. McKenney* (the only reason given by any of the cases for the rule that long acquiescence is no proof of ratification), "that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily." The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it; and the longer it may continue, the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without unnecessary delay whether he will exercise it.

The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after minority within which to act is all that is essential to the infant's protection. That 10, 15, or 20 years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him, is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule, which is solely protection to the infant. Reason, justice to others, public policy (which is not subserved by cherishing defective titles), and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the Court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the Court: *Cochran v. Toher*, 14 Minn. 293 (385); *Derosia v. W. & St. P. R. Co.*, 18 Id. 119 (133). Three years and a half, the delay in this case (excluding the period of plaintiffs' minority), after the time within which to act had commenced to run, was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified.

Order reversed.

Whether such person should have a *reasonable time*, or the *entire period of the Statute of Limitations* within which to disaffirm his deed, see the numerous cases cited in the above opinion.

RETURN OF CONSIDERATION.

A disaffirmance after majority reached of a conveyance made while a minor, may take effect without his placing the grantee *in statu quo* by returning the consideration or otherwise.

DAWSON v. HELMES.

Supreme Court of Minnesota, 1882.

30 Minn. 107.

BERRY, J. This is an action in the nature of ejectment, defendant being in possession. Both parties claim to derive title from Benjamin Young. Plaintiff, to make out his title, put in evidence three pages of Book A of Deeds of the registry of deeds for McLeod County. These are a record of a deed of the land in controversy, dated January 16, 1858, and purporting to have been executed by a guardian of Benjamin Young, and a record of a copy (certified by the Probate Judge of Dakota County) of an order of said Judge, dated February 28, 1858, confirming a sale *assumed* to be that in pursuance of which the guardian's deed was executed. A copy so certified is authorized to be recorded, and the record made evidence, by Laws 1873, c. 57 (Gen. St. 1878, c. 57, §§ 61-63); but we discover no legislation validating any record made, as this was, before the passage of the Act of 1873. We allude to this, however, only with reference to a possible second trial of the case, since upon the trial had the records mentioned were received in evidence, and, so far as the settled case shows, without objection. Our principal concern at the present time is with the *effect* of the order of confirmation, admitting that it was properly proved.

With reference to guardians' sales of real estate, the statute in force at the date of the order of confirmation involved in this case (Pub. St. c. 39, § 21, identical with Gen. St. 1878, c. 57, § 44), provides that "if it shall appear to the Judge of Probate that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of

the property sold, or, if disproportionate, that a greater sum than above specified cannot be obtained, he shall make an order confirming such sale, and directing conveyances to be executed." All the facts necessary to appear to the Judge of Probate to authorize him to confirm a sale are thus specified in the statute. These facts are, therefore, the basis of the order of confirmation, and it adjudicates upon them alone. This adjudication is confined to the acts of the guardian in making and conducting the sale and to the sufficiency of the bid. The order of confirmation passes upon nothing else, and hence it is not proof of any prior proceeding. This construction of our statute is sustained by like constructions of analogous statutes in other jurisdictions: *Mathews v. Eddy*, 4 Or. 225, 234; *Koehler v. Ball*, 2 Kan. 160, 173; *Challiss v. Wise*, 2 Id. 193, 197; *Buckingham v. Granville Alex. Soc.*, 2 Ohio, 360; and see *Rorer on Jud. Sales*, § 104 *et seq.*; *Bethel v. Bethel*, 6 Bush (Ky.), 65; *Shriver's Lessee v. Lynn*, 2 How. 43. No proof of license to sell, or of any antecedent proceeding, was offered upon the trial below. The case was, then, one of a mere purported guardian's sale, without any evidence of authority to make it. Proof of such a sale had no tendency to establish a transmission of title.

The order of confirmation in this case appears from its date to have been made after the execution of the guardian's deed. Although, as a matter of regularity, the confirmation of the sale should precede the execution of the deed, the fact that it succeeds it does not render it ineffectual. It relates to the execution of the deed, and sanctions it, so that the substantial result is the same as if the deed had been made after and in pursuance of the confirmation: *Evans v. Spurgin*, 6 Gratt. 107. We decide this point rather with reference to a second trial than to the exigency of the present appeal.

Further to sustain the guardian's sale, plaintiff relies upon an Act of the Legislature (Laws 1864, c. 45, § 2), which provides that where an order of confirmation of a guardian's sale had been made prior to the passage of such Act, no proceedings shall be had to set aside and vacate the sale after the expiration of two years from such passage, and that the conveyances of the guardian, made in pursuance of any such sale, shall not, after the expiration of said two years, be voided by any Court, etc.

Irrespective of any other objection to the application of these provisions of the Act of 1864 to this case, it is enough to say that they cannot be intended to apply to a sale made by a guardian without any license of sale, or by one not a guardian. Such a sale is not a guardian's sale in any statutory sense. See *Townsend v. Tallant*, 33 Cal. 45; *Bethel v. Bethel*, 6 Bush (Ky.), 65. The same remark is applicable to the provision as the conveyances of guardians. *Streeter v. Wilkinson*, 24 Minn. 288, cited by plaintiff, as the opinion of the Court shows, was the case of a sale made *pursuant to a license*.

Rev. St. 1851, c. 51, § 22; c. 52, § 50, cited and relied upon by plaintiff, are not, in terms, applicable to the case of a party in possession *defending* a title derived from a ward against the affirmative attack of one relying on a guardian's sale. Irrespective of this fact, the plaintiff's reliance upon them is easily disposed of upon grounds analogous to those upon which we have just disposed of his reference to the Act of 1864.

This brings us to the second main question in the case. It appears that on March 11, 1867, Benjamin Young, then a minor, executed a warranty deed of the premises in dispute to the plaintiff's grantors. There was also evidence tending to show, and from which the jury had the right to infer, that on the 12th day of December, 1873, Benjamin Young, then of age, executed a warranty deed of the same premises to Shillock, the grantor of defendant's grantor. The former deed was recorded May 7, 1874; the latter, December 24, 1873.

The defendant contends that the latter deed was a disaffirmance of the former, and in this he is clearly right: *Dixon v. Merritt*, 21 Minn. 196; 1 Am. Lead. Cas. 256-258; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329. It is not claimed that any delay of Benjamin Young to disaffirm was an affirmance of his deed to plaintiff's grantors. In fact, the plaintiff's counsel expressly concedes that the delay would have no such effect in this case. To give effect to the disaffirmance of an infant's deed of land, it is not necessary that his grantee should be placed in *statu quo* by the restoration of the consideration or otherwise: *Chandler v. Simmons*, 97 Mass. 508, 514; *Tucker v. Moreland*, 10 Pet. 58, 73. Where the infant, upon reaching majority, applies to a Court of equity to have his deed avoided,

the rule may be different. But the question then presented differs from that raised by a disaffirmance which has actually taken place. So, too, upon disaffirming, the former infant may, in some circumstances, be liable to restore the consideration to his grantee, or otherwise to place him in *statu quo*; but it does not follow that he must do either of these things as a *condition precedent* of disaffirmance. The rule with reference to the disaffirmance by an infant or former infant of a transfer of personal property is quite different from that as to disaffirmance of an infant's conveyance of real estate. These considerations dispose of most if not all of the authorities cited by plaintiff upon the subject of disaffirmance.

The Court in this case directed the jury to render a verdict for the defendant. The plaintiff contends that the question of fact as to whether Benjamin had avoided his deed to plaintiff's grantors after he reached majority, should have been submitted to the jury. If he means by this that the question whether he ever executed the deed to Shillock should have been submitted to the jury, we think he is clearly wrong. The execution of this deed was so well proved, and the testimony against the execution so worthless, that if the jury had found against the execution it would obviously have been the duty of the Court to set the verdict aside. In such case a direction to find that the deed was executed is not improper: *Phoenix Ins. Co. v. Doster*, 106 U. S. 30. If, again, the plaintiff means that the question, whether the deed to Shillock, admitting its execution, was a disaffirmance of the deed to plaintiff's grantors, ought to have been submitted to the jury, he misconceives the rule of law which makes such deed *per se* a disaffirmance, in the absence of controlling circumstances to the contrary. Upon this point we have already cited authorities.

Order affirmed.

Green v. Green, 69 N. Y. 553; *Craig v. Van Bebber*, 100 Mo. 584; s. c. 18 Am. St. Repts. 569, note; *Chandler v. Simmons*, 97 Mass. 508; *Manning v. Johnson*, 26 Ala. 446.

In many cases Courts have held that the consideration must be returned in cases of disaffirmance. This is especially true in Equity.

Baker v. Kenneth, *supra*; *Kerr v. Bell*, 44 Mo. 120; *Foltz v. Ferguson et al.*, 77 Tex. 301.

EFFECT OF DISAFFIRMANCE.

When one disaffirms a conveyance executed by him while a minor, such disaffirmance reinvests him with the title to the land conveyed.

LOGAN *v.* GARDNER.

Supreme Court of Penn., 1890.

136 Pa. St. 588.

MITCHELL, J. The defence was a deed from plaintiff and her husband, to which the reply was, first, a denial of the making of any deed; and, secondly, infancy at the date of the alleged execution. To this second point, the defence rejoined acts of ratification by estoppel. The cardinal facts, therefore, upon which the jury had to pass were the execution of the alleged lost deed, the infancy of plaintiff at that time, and the acts of estoppel.

As a married woman, the plaintiff could only pass her title in the statutory mode. A disability imposed by law cannot be set aside or evaded indirectly by acts of the party: *Glidden v. Strupler*, 52 Pa. 400; *Grim's App.*, 105 Id. 375; *Stivers v. Tucker*, 126 Id. 74. The learned Judge, therefore, correctly instructed the jury that if defendant had not proved the making and acknowledgment of the deed as required by the statute, they need not go further, but should return a verdict for plaintiff.

The appellant's third and fourth specifications of error complain that too strict a measure of proof was required as to the contents of the lost deed, and that proof of the certificate of acknowledgment alone was sufficient until the certificate was called in question. But the present contention would be more tenable if appellant had asked the Court to say specifically that proof of the certificate was sufficient *prima facie* proof of the execution of the deed and of its contents, so far as they were recited therein. If the deed had been produced, it would have been necessary to show that it contained all the requisites for

the conveyance of plaintiff's title; and a party claiming under a lost deed must be held to proof of the same requisites: *Krise v. Neason*, 66 Pa. 253. The general effect of the charge on this point was correct, and we do not think the jury could have been misled in any way by it. The third and fourth assignments of error are not sustained.

The disabilities of coverture and infancy are separate and independent, and the mere fact that they both occur in connection with the same act does not give either of them any greater force than it would have had separately. If a deed duly acknowledged had been produced, it would have made an end of the question of coverture in the case, and proof of the deed to the satisfaction of the jury would be equivalent to its production. The statute makes no distinction between *femes covert* of full age and those under age; its requirements are the same for all. If, therefore, the jury were satisfied that a deed had been made by plaintiff, the objection of coverture was avoided, and defendant had only to meet that of infancy.

The effect to be given to an infant's deed was long the subject of controversy, but the decided weight of authority now is that it is voidable only; that the title passes by it, and remains in the grantee until some clear act of disaffirmance is done by the grantor after coming of age. The different views are discussed by STRONG, J., in *Irvine v. Irvine*, 9 Wall. 617, 627, and the authorities are well collected in 10 Am. & E. Encyc. of Law, tit. "Infants," p. 649, etc. The law makes no distinction between the deeds of infants on account of sex; nor, as already said, is the disability of coverture made any greater or any different by the additional disability of infancy. They remain separate and distinct. The dictum of Chief Justice GIBSON, in *Schrader v. Decker*, 9 Pa. 14, that the deed, "being executed while the wife was an infant, is absolutely void," must therefore be referred to the unsettled position of the law at that time. The modern authorities are clearly the other way. The cases also show that the infant may affirm his deed by much less formal acts than would be sufficient to avoid it, and clearly by any act which amounts to an estoppel: *Irvine v. Irvine*, *supra*; *Wheaton v. East*, 5 Yerg. 41; *Bostwick v. Atkin*, 3 N. Y. 53; *Davis v. Dudley*, 70 Me. 236; *Wallace v. Lewis*, 4

Harr. (Del.) 75 ; Tunison v. Chamblin, 88 Ill. 378, 386 ; Singer Co. v. Lamb, 81 Mo. 221. The acknowledgment and certificate, even if in the strict statutory form, would not estop a *feme covert* from showing her infancy at the time: Williams v. Baker, 71 Pa. 476. But, when it is said in that case, that she could not ratify a deed after coming of age, except by a re-acknowledgment in the mode prescribed by the statute, this must be understood as limited to ratification during coverture. As soon as she becomes discover, and of full age, she stands in the same position in regard to acts of estoppel *in pais* as other persons *sui juris*. In the present case, the plaintiff, in 1879, being then of full age, left her husband on account of his treatment, for which she subsequently obtained a divorce. The Judge charged the jury, and we must assume rightly, upon the evidence, as that point is not now before us, that from 1879 to 1882 plaintiff was under no legal disability, and her acts and conduct, with regard to their effect upon her title were those of an unmarried person, and of course of a person of full age. But, in answering the defendant's points, the jury were told that before they could find an estoppel they must be satisfied that the plaintiff, with knowledge of her rights, and of the improvements and expenditures being made on the premises, acquiesced in and *encouraged* such improvements. This presents the only substantial question in the case.

The doctrine of estoppel *in pais* has been very much expanded in modern times, particularly in Pennsylvania, where equitable principles are applied in actions at law. The cases are very numerous, but it is not necessary to refer to more than a few of them. In Woods v. Wilson, 37 Pa. 379, the subject was discussed by Chief Justice THOMPSON, and it was held that silence, in ignorance of one's own right or of another's expenditures, will not estop, but that mere silence, with knowledge, is evidence from which a jury may find an estoppel. See, also, Hill v. Epley, 31 Pa. 331, and Miranville v. Silverthorn, 48 Id. 147. These decisions rest on the ground that the circumstances were such as to raise a duty to speak, and that failure to do so is either a fraud, or will work such an injury as would be equivalent to a fraud, if the party should not be estopped. On the other hand, it was held as early as Buchanan v. Moore, 13 S. &

R. 304, and *Robinson v. Justice*, 2 P. & W. 19, that positive acts of encouragement, or which help to mislead, will raise an estoppel, without any fraud and irrespective of the party's knowledge of his own rights. And, as was pointed out by Chief Justice GIBSON, this result rests on a different principle: that, of two innocent parties, the one who occasioned the loss must bear it. See, also, *Chapman v. Chapman*, 59 Pa. 214; *Miller's App.*, 84 Id. 391; and *Putnam v. Tyler*, 117 Id. 570, 586. The distinction, therefore, between the cases where acts or declarations of encouragement are necessary to create an estoppel, and those where mere silence or acquiescence will be sufficient, is one of principle, and each case as it arises must be assigned to one or the other class, according to its circumstances, the chief of which is knowledge or ignorance of the party's own rights and the other's action. Encouragement is necessary where the party is ignorant; but knowledge creates the duty to speak, and, where that exists, silence is enough to estop.

The present case belongs in the class of *Woods v. Wilson*, where silence, with knowledge of expenditures being made by the party in possession, may be sufficient to create an estoppel. The learned Judge put it into the other class, by charging the jury that there would be no estoppel unless the plaintiff encouraged the improvements. Into this he was no doubt led by plaintiff's sixth point, that a married woman cannot be estopped by improvements made by the vendee, even with her knowledge and encouragement. This was properly affirmed as to knowledge and encouragement during coverture; but the same phrase, thus unfortunately suggested, was no doubt inadvertently carried into the answers to points relating to estoppel by conduct after the disabilities of coverture had ceased. This tended to mislead the jury into supposing that something more than mere silence, something active or positive on the part of plaintiff, was necessary to estop her, and, in so doing, it put a heavier requirement on defendants than the case justified. For this slip, in an otherwise clear and accurate charge, we are obliged to reverse the judgment.

Judgment reversed, and venire de novo awarded.

FRENCH v. McANDREW.
Supreme Court of Mississippi, 1883.

61 Miss. 187.

COOPER, J. We concur in the finding of the Chancellor, that Mrs. McAndrew was entitled to the cancellation of the conveyances made by her during minority. The effect of the disaffirmance made by her is to render the conveyance void *ab initio* by relation, and to entitle her to charge the purchaser for rents during the whole time that he occupied the property, claiming under her deeds: *Wustar v. Tropfield's Heirs*, 15 Gratt. 329; *Tucker v. Moreland*, 10 Peters, 71; *Moore v. Jones*, 24 Ala. 420. But the defendant by the conveyances acquired the title of Mrs. Hubbard, who was the co-tenant of the complainant, and thus became co-tenant with her, and his liabilities and rights are therefore to be tested by the rules governing co-tenants.

The objection urged by counsel for the appellant, that he has been charged with rents of the property on the ground of his possession of the common property, is not sustained by the facts, for it is affirmatively shown that his possession was a remunerative one, and where one co-tenant occupies and uses the whole estate or more than his share thereof to the exclusion of his co-tenant he is liable to an action for an account by the co-tenant, who has been kept out of the use of his portion of the estate.

Mrs. McClure, one of the grantors in the conveyances to French, was the widow of Powell, from whom the complainant took the land in controversy by descent. As such widow, she was entitled to dower in the lands, and by her conveyance this right, in equity at least, passed to the defendant: 2 Scribner on Dower 45, and authorities there cited. The widow cannot now say that she does not claim and never claimed her right as doweress. By conveying, she asserted some claim to the property, and whatever right she had passed to the purchaser. While she was owner of the dower right she might have released it to her daughters, but having assigned it to another, she cannot now waive what is his and not hers.

The record does not show the date of the appointment of the administrator of Powell, and we are unable to say whether the judgment in favor of Houston was or was not a charge upon the lands. If it was, and was paid off by the purchaser as a part of the price agreed to be paid for the lots, he should be allowed a credit for the amount in the accounting.

The tax title set up by the defendant was void. There was no authority in law for a sale of lands in 1876 for the taxes of 1874. There is no admission here, as there was in *Hucke v. Chrisman*, 60 Miss. 671, that the statement of the year for which the taxes were due was miscredited by clerical error.

The Court erred in decreeing the amount found due to the complainant from the defendant to be a lien on his interest in the land. The complainant is a creditor of the defendant for any amount which may be found due her on the account, and for such sum she is entitled to a general decree against him, but to be enforced and collected as are other decrees for other debts. Her demand is not more meritorious than that of any other creditor, and she occupies no more favorable attitude than any other person having a legal demand against the defendant.

Judgment reversed.

McCARTHY v. WOODSTOCK IRON Co.

Supreme Court of Alabama, 1890.

92 Ala. 463.

CLOPTON, J. Our decisions, which are in harmony with the later adjudications, have established that a contract of purchase of land entered into by an infant, whether executed or executory, is voidable, subject to confirmation or disaffirmance, at his election, on arriving at age. The right of election is personal, and paramount to any equity of the other party; it may be exercised without reference to his assent or dissent. When the infant has exercised the privilege to rescind his contract, he can not afterwards abandon or repudiate the rescission, and take the other alternative. The disaffirmance renders the contract void *ab initio*, and restores the rights of the parties to the same condition in which they would have been had no contract

been made, though the adult party may, in some cases, and under some circumstances, be remediless.

Appellee, the Woodstock Iron Company, seeks by the bill the cancellation of a deed, made May 1, 1884, conveying to appellant a lot in the city of Anniston. The cancellation is sought on the ground that the grantee was a minor at the time of its execution, and after arriving at his majority disaffirmed the contract of purchase, without reconveying or offering to reconvey the property, and retains the deed, denying complainant's right to a conveyance. The answer denies disaffirmance, and sets up confirmation of the contract, of which complainant had notice long before the bill was filed.

The main point of contention involves the construction and effect of a letter, admitted to have been written by defendant to complainant, March 16, 1886. The following is a copy: "In the spring of 1884, I purchased from you a lot in the city of Anniston, and paid you three hundred and thirty-four dollars; also gave you two notes, each calling for three hundred and thirty-three dollars, being interest from date, one due one year, and the other two years. I do not think that the Woodstock Iron Co. has performed its part in its attitude towards the town, and for this reason, I claim from the W. I. Co. three hundred and thirty-four dollars, with interest from date of deed. The company can not ignore this claim, because the trade was made before I was of age. I consider myself, under the circumstances, justified in repudiating the trade, and claiming the law on the subject." Defendant contends that the letter is the mere expression of an intention to repudiate the contract if the demand therein made was not complied with; or a conditional repudiation, and, in order to make it complete and effectual, should have been followed by suit to recover the money, or by some unequivocal act of equal notoriety and solemnity with the original act.

In support of their contention counsel refer to the case of *Irvine v. Irvine*, 9 Wall. 617. The question under consideration being whether, in order to be sufficient to affirm an infant's deed, the act of affirmance must be of the same solemnity of the deed itself, it was said: "There is a well-recognized distinction between the nature of those acts which are necessary

to avoid an infant's deed, and the character of those which are sufficient to affirm it; and the act of confirmation, being of a character less solemn than the act of avoidance, may be effected in a less formal manner." The reasons assigned for the distinction are that the deed of an infant, not being void, passes the title to the land to his grantee, and if avoided, the ownership is re-transferred, and the seizin changed; while a confirmation passes no title, effects no change of property, and disturbs no seizin. The question in that case was whether the infant had affirmed his deed; the nature of the act sufficient to avoid a contract of purchase was not involved. Also, there is a well-recognized distinction between the acts which will avoid an infant's deed in the case of a sale, and those which will avoid a contract of purchase, though a deed was made to the infant. Acts which are usually regarded as necessary to avoid an infant's deed—such as entry, selling and conveying to another, and bringing suit to recover possession—would amount to a confirmation in the case of purchase.

Even in respect to the avoidance of deeds made by infants, the current of modern decisions is to a liberal extension of the rule; and the tendency is to establish one simpler, more conservative, and of easier and more general application, thereby avoiding many of the perplexing and refined distinctions under the strict rule which required the act of disaffirmance to be of equal notoriety and solemnity with the original act or conveyance, but which was never of universal application, for the deed could always be avoided by a proper plea. In *McCarthy v. Nicrosi*, 72 Ala. 332, speaking in reference to the avoidance of an infant's deed, or other executed contract, it is said: "The usual rule is, that any such contract may be affirmed by unequivocally recognizing its continued existence and binding force. So, it may be disavowed by some distinct and positive act, leaving no room for doubt as to the intention of the party. This may be effected by *notice* of disaffirmance, by *suit*, *plea*, or *entry* upon real estate, or other unmistakable act of dissent, or of confirmation, as the case may be." *A fortiori*, a contract of purchase of land may be disaffirmed by the infant, after attaining majority, by act manifesting distinctly and unequivocally an election and intention to disaffirm—by any act of distinct

and positive dissent, whatever may be its form or expression : *White v. Flora*, 2 Tenn. 426 ; *Drake v. Ramsay*, 5 Ohio, 251 ; *Tennison v. Chambliss*, 88 Ill. 378 ; *Singer Man. Co. v. Lamb*, 81 Mo. 22. This rule is consistent with, and conserves the absolute and paramount right of disaffirmance.

Recurring to the letter, there seems no room for doubt as to the intention of defendant. It was written a few days after he had arrived at twenty-one years of age ; states the precise terms of the contract, so that there could be no mistake, and claims the exact amount of the purchase-money paid, with interest from date of deed. The reason assigned, that the company had not performed its part in its attitude toward the town, is not stated as the legal basis of the claim—he shows no injury he had sustained by the conduct of the company, or what that conduct was, but as morally justifying him “in repudiating the trade and claiming the law on the subject.” What law ? The law which gave him the right to disaffirm a contract entered into while a minor, which is the only legal ground stated why the company could not ignore the claim. Claim of repayment of the precise sum paid at the time of the purchase, with interest from the date of the deed, is inconsistent with the recognition of the continued existence of the contract ; for, without rendering it void by disaffirmance, he had no right to claim the return of the money.

But it is said the money was not returned, and no suit was brought for its recovery. As we have stated, the exercise of defendant's right did not depend upon the conduct of the company. Neither the manner in which the letter was treated, nor the failure or refusal to return the money, could affect in any way the exercise of defendant's right of election, or avoid the effect of the disaffirmance. A suit to recover the money would itself have been an act of avoidance ; but it is not necessary the letter should be followed by such suit to render it effectual as an act of disaffirmance. And though rescission of the contract restores the rights of the parties to the situation in which they were when the contract was entered into, an offer to reconvey the lot was not essential to a complete disaffirmance. An infant need not tender any thing he may have acquired or received under the contract. He subjects

himself to liability to account for what he has received and has in possession when he reached his majority, and may sue for what he has paid. A tender is only material and essential as a condition to the right of either party to sue and recover in equity: *Eureka Co. v. Edwards*, 71 Ala. 248; *Chandler v. Simmons*, 97 Mass. 508; s. c., 93 Amer. Dec. 117. The letter, being a demand or claim for the repayment of the money, without qualification or condition, on the sole ground that defendant was a minor at the time of the purchase, must be regarded as a distinct and positive act of dissent, unequivocally manifesting his intention and election to disaffirm the contract.

Another point of contention arises on the ground of demurrer to the bill, that, conceding an avoidance, complainant's remedy at law is complete and adequate. The position is that on disaffirmance the title to the lot was, *ipso facto*, retransferred to complainant, and the company can maintain ejectment to recover possession. Many authorities so hold in respect to the avoidance of an infant's deed; and, as an infant's deed passes the title to his grantee, subject to the right of the *grantor* to confirm or avoid—in legal effect a conditional transfer, continuing in force until avoided and defeated by disaffirmance—it may be that avoidance in such case operates *proprio vigore*, to divest the grantee of the title, and reinvest it in the grantor. But the case is different when the deed is made by an adult grantor to an infant, under a contract of purchase; such deed is not subject to avoidance by the grantor at his option or election. It has been uniformly held in this State that an estoppel resting in parol, though it may bind the land in equity, does not and can not affect the legal title in a court of law: *McPherson v. Walters*, 16 Ala. 714; *Morgan v. Carey*, 73 Id. 222. It has also been held that the rescission of a contract of purchase, and cancellation or destruction of the deed by agreement of the parties, will not divest the title out of the grantee and reinvest it in the grantor: *Brady v. Huff*, 75 Ala. 80. It is true that when an infant disaffirms his contract of purchase after becoming of age, it ceases to exist for the benefit of either party, and is rendered void *ab initio*, and the other party is re-invested with a right to whatever he has parted with under the contract, and may sue to reclaim it. But it results from the

foregoing well-established principles that when the grantor is capable of passing the title, and the grantee capable of taking, the deed not being subject to avoidance by the grantor, no act *in pais* will operate to retransfer to him the legal title. The disaffirmance destroyed all defendant's equitable claim to title to the land, but did not affect the legal title.

Defendant having once disaffirmed, could not repudiate it and then confirm ; the contract having been made void can not be revived except by mutual consent. Still he retains the deed and denies complainant's right to a conveyance, claiming that he abandoned the idea of disaffirming, and has confirmed the purchase. The real object of the bill is to procure a judicial ascertainment of the rescission of the contract and the enforcement of the rescission by cancellation of the deed. The bill offers to pay the amount paid by defendant, and to return the purchase-money notes. Its equity rests on the jurisdiction of the Court of the rescission of contracts. The bill and proof make a case for relief.

Affirmed.

PERSONAL PROPERTY.

VOIDABLE CONTRACTS RESPECTING PERSONALTY
DISAFFIRMED.

An infant's contract respecting personalty, not necessities, may be disaffirmed by him either *before* or within a *reasonable time after* his majority.

SHIPMAN *v.* HORTON.

Supreme Court of Errors, 1846.

17 Conn. 481.

WILLIAMS, Ch. J. The defendant insists that Horton, being an infant, had a right to rescind his contract, and retake his goods. The plaintiff admits that he might have avoided it at full age, but not while he remained an infant.

In case of a deed of land by an infant, it seems to be settled that the conveyance cannot be avoided until the infant arrives at full age, and, in case of marriage, not until he arrives at the age of consent: *Zouch v. Parsons*, 3 Burr. 1808 ; 3 Bac. Abr. tit. Infancy, A. And we have found no case in which this doctrine has been extended to personal property, except that of *Roof v. Stafford*, 7 Cow. 179, which was reversed by the highest Court of the State: 9 Id. 626. And when we consider that if this was so, the infant would in many cases, by the use or loss of the property, be deprived of the benefit of this principle, we concur with the final decision of that case, and with the Court below; and hold that such a contract might be avoided by the infant before he was of age. So too we concur in the general principle laid down by the Judge at the trial, that the recapture of personal property by the owner must be made in a peaceable manner, and not by the perversion of legal process. And it is certain that under such a claim a person cannot justify an assault and battery: *Sampson v. Henry*, 11 Pick. 379; *Gregory v. Hill*, 8 Term R. 299. But this is not a

case of that character, but an action of trespass for the goods themselves. And we have at this term in the case of *Bowler v. Eldridge*, Fairfield County, *post*, decided that a person has a right to retake his personal property from the unlawful possession of another. Of course, it must follow that if this contract has been rescinded by Horton, and the title thus revested in him, an action of trespass could not be sustained against him for taking the goods.

But upon an attentive consideration of the facts stated in this case, and the respective claims of the parties on the trial, we are of the opinion that the charge upon this point could not have affected the proper termination of the cause.

The plaintiff claimed to have purchased most of the goods in dispute of Horton, but that other goods of his were also taken, together with the avails of goods sold; and as to the taking of these goods there was no dispute. Had then the defendants attempted to justify the taking of the goods upon the ground that they were originally Horton's, and sold by him to the plaintiff, and that he had rescinded the contract thus made with the plaintiff, it is apparent that the defence would not have been as broad as the claim of the plaintiff; because it was not denied that other property was taken by Horton than that which was sold or delivered by him. The defendants, therefore, took other and broader ground, viz., that the goods were never sold by Horton to the plaintiff, but that they were delivered by him to the infant son of the plaintiff, to sell and account for; and that the father was merely surety therefor; and that by the contract itself they were to be redelivered to him by Albert whenever he chose to demand them; that such a demand was made, and Albert refused to deliver them; after which he procured the writ and a surrender of the goods. And no evidence was given or claim made that any contract with the plaintiff was ever rescinded by Horton, unless these transactions with Albert furnished such evidence. Nor was the Court requested to charge the jury that these facts were evidence tending to show a rescinding of the contract.

So far from any claim, in fact, of a rescinding of the contract with the plaintiff, the whole defence proceeded upon the

ground that no contract was ever made with him. And even as it respects the contract claimed to have been made with Albert, the defence proceeded, not on the ground that the contract had been rescinded, but in affirmance of the contract. Horton claimed that by virtue of the contract itself he had a right to stop Albert whenever he was dissatisfied, and to take the goods originally purchased, together with the avails of them; and thereupon in the settlement no distinction was made between the goods originally purchased and those which had since been procured by Albert from the avails of the goods sold.

The case then stands thus; for the question of title was distinctly submitted to the jury. The goods were sold by Horton to the plaintiff. The plaintiff's case rested entirely on this; and the jury must have so found.

Is there, then, any single fact stated tending to show that the defendant Horton had rescinded this contract?

So far from it, he denies there ever was any contract with him. He also denies any contract of sale with any one, but that he placed the goods in the hands of Albert as his agent; and that so far from rescinding that contract, he has acted throughout in pursuance of it. Whatever, therefore, might be the opinion of the Court upon the charge, as applicable to a supposed case, we think the defendants have shown no cause of complaint; because, upon the facts stated in this motion, we do not see any foundation laid for a claim that the contract with the plaintiff had been rescinded. On the contrary, the whole character of the defence is inconsistent with such a claim.

Were it not so, it is apparent that the defence did not cover the whole claim of the plaintiff. For if the contract with the plaintiff had been rescinded, we do not see how that would have vested in Horton a title to that portion of the goods which was never owned by him, but which was purchased from the avails of the goods then clearly the plaintiff's.

If an infant sells a horse and wagon, and the purchaser sells the horse and buys another, it will hardly be claimed that if the infant avoids the contract the last horse is his. So here, the watch and other articles, the avails of the goods sold, can-

not become the property of Horton, and the plaintiff must recover therefor, unless another claim of the defendants is well founded, viz., that the settlement with Albert transferred this and all the property to Horton. This has not been much insisted on; but it forms part of the case. The plaintiff had put these goods into the hands of a minor son, to furnish him with employment as a peddler; and as he had authority thereby to peddle and sell the goods, it is supposed he had a right thereby to deliver them in payment of a debt not then due to Horton, who must be supposed cognizant of all the facts relating to this transaction. The object of the plaintiff was to fit his son for this business: for this he bought the goods and placed his son under the direction of Horton. To say that because he gave his son power to sell these goods, as a peddler, it gave him power to sell them in a lump, to pay a debt not due, is to give a very broad construction to this power. To say that a clerk in a retail shop, because he had a right to sell goods, had a right to sell them in a lump, in payment of the merchant's debts, would hardly be contended; and yet in this case it must be claimed that a minor son might make such a disposition of the property as would entirely defeat the object of the purchase, and terminate the sole intent for which it was made.

Such a construction would be in the face of the principle that all powers are to depend upon "the substantial intention and purpose of the party," as is said by LORD MANSFIELD in *Ren v. Bulkeley*, Doug. 293. We think there is no foundation for this argument. The plaintiff then must have been entitled to recover for some part of this property; and although we do not know the comparative value of the property originally sold, and that which has been since acquired, yet when we look at the sum given in damages we should hesitate in opening this case to see how much that sum should be reduced, if this had been the only question.

We have no rule, as in some of the Courts in England, that we will not grant a new trial where the sum in controversy is less than 20l.: *Jones v. Dale*, 9 Price, 592. But where the mistake, if any, can make but trifling difference, we should be

disposed to follow the practice in New York, and deny a new trial: *Hyatt v. Wood*, 3 Johns. R. 239.

In this opinion the other Judges concurred.

New trial not to be granted.

Adams v. Beall, 67 Md. 53; *Hoyt v. Wilkinson*, 57 Vt. 404; *Fowler v. Dresser*, 73 Me. 252; *Willis v. Twombly*, 13 Mass. 204; *Carr v. Clough*, 26 N. H. 208; *Carpenter v. Carpenter*, 45 Ind. 142.

Some cases hold that disaffirmance cannot be made by the infant until he has reached his majority: *Boody v. McKenney*, 23 Me. 517; *Farr v. Sumner*, 12 Vt. 28.

See respecting partnership agreements, *Dunton v. Brown*, 31 Mich. 182.

HOW DISAFFIRMED.

The disaffirmance may be made by such act or utterance on the part of the infant, as clearly evinces to the other party that he totally renounces the contract.

CHAPIN *v.* SHAFER.

Court of Appeals, New York, 1870.

49 N. Y. 407.

PECKHAM, J. One George Chapin, an infant, being indebted to the defendants for the balance of an account for three suits of clothes, one for himself and two for others, gave them a chattel mortgage upon a horse, to be void in case he paid \$110 in ninety days from the 20th of January, 1868. On the same day he sold the horse to this plaintiff and delivered it to her. He refused to deliver the horse on the mortgage to the defendants. When the mortgage was due, the defendants took the horse from plaintiff's possession, and she brought this action therefor. In August thereafter, directly after George Chapin became of age, he ratified the bill of sale to plaintiff by writing indorsed thereon.

It appeared in the evidence that Chapin was induced to give this mortgage by threats of being arrested for obtaining goods by false pretences; so testified by him, affirmed by defendants' agent who made the threats by their authority, and not in sub-

stance denied by them. The referee found the other way upon this question, and if it be without any evidence to support it, still there is no affirmative finding of duress, nor any request so to find. In such case we cannot review the point.

What right did defendants acquire by this mortgage as against the mortgagor? The horse mortgaged was not delivered to the defendants, but retained by the mortgagor. To this extent this sale by way of mortgage was not executed.

The actual possession remained in the mortgagor. In such case the mortgage is made *prima facie* void by our statute, as against subsequent creditors, etc.: 2 R. S. 136, § 5.

The mortgagor here being an infant, we have the authority of *Stafford v. Roof*, 9 Cow. 626 that the mortgagees, in such case (no possession having been delivered), would be trespassers in taking possession of the horse.

By another rule of the common law it is declared that where the contract or instrument is to the disadvantage of the infant, it is void; that no contracts of infants are void except those in which it would be better for the infant as a general principle that they should be so held: *Zouch v. Parsons*, 3 Burr. 1805; *Breckenridge v. Ormsby*, 1 J. J. Mar. 236; *Keane v. Boycott*, 2 H. Blacks. 511; 2 Kent, 236.

It is difficult to see how, as a general principle, it can be advantageous to an infant to give a mortgage upon personal property at a short date to secure an old debt, which as a general rule puts a mortgagor in embarrassed circumstances quite in the power of the mortgagee, certainly in most cases to sacrifice the property at a forced sale. Giving a mortgage to secure the purchase-money of property is a different thing. The end of the rule is the protection of the infant. (See last cases.)

But I do not rest the case upon this ground, as the tendency of modern authorities is to make nearly all deeds or contracts of infants not void, but voidable.

Assuming that the mortgage is voidable only, then the mortgagor had a right to avoid it at any time before he arrived at age, and within a reasonable time thereafter, by any act which evinced that purpose: *Bool v. Mix*, 17 Wend. 119; *Stafford v. Roof*, *supra*; *State v. Plaisted*, 43 N. H. 413, and

an unconditional sale of the property is such an act. (See last case.)

I think the sale to this plaintiff on the same day the mortgage was executed, and the delivery of the horse to her, was such a sale.

True, the terms of the sale were all the vendor's "right, title, and interest" in the property, but afterwards came a covenant "to warrant and defend the sale of said goods and chattels, *hereby made* unto the said Eliza, against all and every person whomsoever."

The bill of sale embraced many other chattels of the vendor, and these words therein were obviously intended to convey the chattels absolutely. Taking the whole instrument together, it was an unconditional sale with warranty. Such is its manifest purpose. The covenant of warranty so in substance speaks. The cases referred to by the appellants' counsel are all cases of real estate, where the rules of construction are different. In sales of personal property, warranty of title is always implied; not so as to real estate.

The mortgage is thus absolutely avoided.

Again, the ratification of the bill of sale after the infant's arrival at age was for a like purpose, treating it as a "bill of sale and assignment" of the property. The purpose to ratify this and to rescind the other is plain; no particular form of words was necessary. This avoided the mortgage. It was thus made void. The defendants' authority for taking the horse was gone. The defence was thereby struck out. I incline to think this operated to make the defendants trespassers from the beginning in taking the horse. Their title was never perfected. Before it ripened, it was extinguished by this dissent.

The order should be affirmed, and judgment absolute for plaintiff.

All concur except FOLGER, J., not voting.

Judgment accordingly.

Cogley v. Cushman, 16 Minn. 397.

MISREPRESENTATION AS TO AGE.

If the infant, at the time of making the contract, represents himself to be of age, he may nevertheless disaffirm it.

CONRAD v. LANE.

Supreme Court of Minnesota, 1880.

26 Minn. 389.

BERRY, J. This is an action in the nature of assumpsit, in which the plaintiffs seek to recover the reasonable value of certain merchandise sold and delivered to defendant. It was tried by the municipal Court, without a jury. The Court finds that, in 1874, plaintiffs sold and delivered to defendant, then an infant, merchandise (not necessities) of the value of \$214.81, upon which there remains unpaid a balance of \$131.81; that defendant was then engaged in business in his own name and for his own benefit, holding himself out to be of age, and that, on the faith of such holding out, the goods mentioned were sold and delivered to him. Defendant became of age on January 31, 1877.

As a conclusion of law, the Court finds that defendant is estopped to set up his infancy as a defence. This is unsound. The familiar rule which, in general, disables an infant from binding himself by contract, is founded upon the idea that, as a general thing, persons are, by reason of immaturity and inexperience, incompetent and unfit to judge of the nature of a contract, and of the propriety of entering into it, before the age of legal majority; if anything can be said to be the policy of the law, this rule is beyond question a part of the policy of the law respecting infants. To make an exception to the rule in cases in which the infant has, at the time of making an alleged contract, represented himself to be of age, would be a manifest infringement upon this policy of the law—a disregard of the reasons upon which it is founded and of the purpose which it has in view, viz., to protect the infant from being

drawn into contracts which it is not necessary for him to make, and of which he is not capable of judging. In our opinion no such exception should be or is allowed.

The view is in accordance with the great weight of authority: *Merriam v. Cunningham*, 11 Cush. 40; *Burley v. Russell*, 10 N. H. 184; *Gilson v. Spear*, 38 Vt. 311; *Studwell v. Shapter*, 54 N. Y. 249; *Ewell's Lead. Cas.* 219, and note; *Benjamin on Sales*, 18. The point made as to defendant's failure to disaffirm the contract after reaching majority is disposed of by what is said on the subject of disaffirmance in *Miller v. Smith*, *ante*, p. 248.

Judgment reversed.

Merriam v. Cunningham, 11 Cush. 40.

In respect to contracts regarding *land* the same is true even if the infant asserts in the deed that he is of full age. *The doctrine of estoppel in pais does not apply to a minor*: *Wieland v. Kobick*, 110 Ill. 16; *Sims v. Everhardt*, 102 U. S. 30.

RETURN OF CONSIDERATION.

It is not indispensable that the minor return or offer to return the consideration before he can make an effectual disaffirmance of his contract.

MILLER v. SMITH.

Supreme Court of Minnesota, 1879.

26 Minn. 248.

CORNELL, J. The complaint is not only for an alleged wrongful taking originally, and an unjust detention, but for a subsequent conversion of the property after demand. There was some evidence to support a finding that after the purchase of the property by defendant at the foreclosure sale, and while he still had it in his possession and control, the plaintiff disaffirmed the transaction, on the ground of his infancy, demanded a return of the property, which was refused, and that the defendant afterwards sold and disposed of the same to his

own use. The exception taken to the refusal to charge the defendant's second request cannot, therefore, be sustained.

The main point presented for adjudication, however, is upon the correctness of the Court's refusal and charge upon the right of the plaintiff, because of his infancy, to avoid the mortgage he gave to the defendant, and reclaim the mortgaged property, without returning to the defendant the money which he borrowed of him, and for which the mortgage was given as security. The instruction asked was as follows: "The plaintiff, if a minor, could not disaffirm the sale by mortgage to the defendant, and reclaim the mortgaged property in question as received by it, without returning the money secured by it." This the Court refused, and thereupon instructed the jury that, "if they should find the plaintiff to be a minor, still he may recover in this action, without returning or offering to return to defendant the consideration secured by the mortgage in question, or the money by him borrowed of defendant." To this refusal and instruction the defendant excepted, and now claims error on the ground that the plaintiff could not avoid the mortgage without repaying the loan made of defendant, and that is the only point presented for our consideration.

The facts bearing upon this point, as gathered from the evidence, viewed in the most favorable light for defendant, are briefly these:—

The plaintiff, an infant, being indebted to one Law upon a promissory note of \$40, part purchase-money of a pony, made a loan of the defendant which he mostly used in paying up that note. To secure this loan, he gave the defendant his note, secured by a chattel mortgage upon the pony and a yoke of oxen, of which the note and mortgage in controversy are renewals. The amount of this last note and mortgage is \$70 principal, due in two months, and drawing twelve per cent. per annum interest. The sum of \$70 actually included \$12.70 for discount, commission, charges and expenses, so that plaintiff realized on his loan only \$70 less that sum. It is recited in the mortgage that the pony was bought of one Law for \$65, and the cattle of one Funk for \$125, and that they had been paid for. No delivery of the mortgaged property was ever made by the plaintiff to defendant, but they were taken from

his possession without consent, upon default in the conditions of the mortgage, and sold on foreclosure, the defendant bidding them in himself, when plaintiff gave notice of his disaffirmance of the note and mortgage, and demanded possession of the property.

The plaintiff testifies that he used the pony for herding, and the cattle for plowing and breaking. Aside from this, there was no evidence tending to show the plaintiff's business or occupation, or bearing at all upon his condition or circumstances in life. Upon these facts it is clear that the mortgage was not one for securing the purchase-money of mortgaged property bought of the mortgagee, as was the case in *Cogley v. Cushman*, 16 Minn. 397, 402, cited by defendant; neither was it a contract of security for necessities, nor for moneys to be used in buying them. A pony is not within the class of necessities, as that term, in its legal sense, is ordinarily used and applied: *Rainwater v. Durham*, 2 Nott & McCord, 524; *Smith-peters v. Griffin*, 10 B. Mon. 259; *McKanna v. Merry*, 61 Ill. 177; *Merriam v. Cunningham*, 11 Cush. 40. It can never be so regarded, except, perhaps, in a case where, from some special circumstances, its use to the infant can be deemed essential in serving some of the purposes of an article of necessity, by supplying some of his actual wants and needs, regard being had to his situation and condition in life. If the existence of such circumstances is claimed in any case, the burden of showing the fact is upon the party making the claim. It will not be presumed as against the infant: 2 Greenl. Ev. § 364.

In the case at bar no such special circumstances were shown, and there was no evidence tending to show, that the plaintiff needed a pony for any use beneficial to himself. The mere fact that he used it for herding was not enough. It does not appear that he used it as a means of support, or that his needs or necessities required it. His note to Law was not, therefore, a binding obligation upon him, and the note and mortgage given to defendant, for money with which to pay it, cannot be upheld upon any principle applicable to the executory contracts of infants for necessities. They stand upon no better footing than like obligations of an infant, given for borrowed money, payable at a future day, without any delivery by him of the

property covered by the mortgage to the mortgagee. As such they were voidable at the option of the infant, at any time during infancy, or within a reasonable time thereafter: *Stafford v. Roof*, 9 Cow. 626; *Chapin v. Shafer*, 49 N. Y. 407; *Randall v. Sweet*, 1 Den. 460; and it may well be questioned whether the illegal exactions which the defendant in this case retained for discount, commission, and expenses out of the sum for which the plaintiff gave his note and mortgage, drawing interest at twelve per cent. per annum, did not render the whole transaction absolutely void as against the infant. It was clearly inequitable and disadvantageous to his interests. But whether void, or voidable only, is, perhaps, an immaterial injury, for the reason that the point of defendant's objection to the refusal and instruction does not rest upon the proposition that the plaintiff could not legally avoid the note and mortgage in question, and reclaim his property, but that he could not do so without returning the amount of the loan.

If an infant can borrow money upon mortgage security upon his property, without any reference to his necessities, and cannot, upon reaching the age of legal discretion and capacity, or before, repudiate the transaction, except upon the condition of returning the amount of the loan whether he has it or not, this privilege, which the laws accords to infancy for its protection, will generally be of little benefit. Under the operation of such a rule, money-lenders would soon become permanently possessed of the property of infant spendthrifts, for with them the temptation to borrow for immediate gratification is generally too great to be resisted. Its adoption as a rule would be in violation of the principle of protection that underlies the whole doctrine of the law appertaining to the dealings and contracts of infants.

In the case at bar it is not shown that the plaintiff retained any portion of the borrowed money at the time he gave notice of disaffirmance to defendant, and demanded a return of his property; but it affirmatively appears that he had already spent most of it in taking up the Law note. Under these circumstances, an offer to return the loan or to pay it was not necessary to enable him to reclaim his property, or to maintain

this action: *Manning v. Johnson*, 26 Ala. 446; *Walsh v. Young*, 110 Mass. 396; *Chandler v. Simmons*, 97 Id. 508.

As the plaintiff has remitted from the verdict the amount found for damages for the detention of the property, the consideration of defendant's last point is unimportant and unnecessary.

Order affirmed.

But if the minor has received money or property under a contract which he disaffirms, he must return it if it is in his power to do so: *Price v. Furman*, 27 Vt. 268.

But if, *during infancy*, he has spent or squandered it, he will not be required to return its equivalent: *Miller v. Smith*, *supra*.

The same principles hold in contracts respecting realty: *Brandon v. Brown*, 106 Ill. 519; *Chandler v. Simmons*, 97 Mass. 508; *Green v. Green*, 69 N. Y. 553; *Reynolds v. McCury*, 100 Ill. 356.

EFFECTS OF DISAFFIRMANCE.

Disaffirmance by the infant annuls the contract as to both parties, *ab initio*, and they revert to the same situation as if the contract had not been made.

BOYDEN v. BOYDEN.

Supreme Judicial Court of Mass., 1845.

9 Pick. 519.

SHAW, C. J. The questions as to what contracts of an infant are void and what voidable, and, in the latter case, what shall be deemed a disaffirmance and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase-money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant after coming of age: *Whitney v. Dutch*, 14 Mass. 457. It is also well settled that it is the privilege of the minor only to disaffirm

the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, *ab initio*, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revert in the vendor: *Badger v. Phinney*, 15 Mass. 359. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further, if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it, such detention, use, or disposition—which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold, after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The Court are of opinion that the directions of the Judge at the trial were right, and well adapted to the case presented by the evidence. See *Boody v. McKenney*, 10 Shepley, 517.

Exceptions overruled.

Hoyt v. Wilkinson, 57 Vt. 404.

PERSONAL SERVICES.

An infant may disaffirm his express contract for his services and recover their *reasonable value*.

GAFFNEY v. HAYDEN.

Supreme Judicial Court of Mass., 1872.

110 Mass. 137.

MORTON, J. This is an action of contract to recover for work and labor performed by the plaintiff for the defendants in the months of April and May, 1870. The plaintiff is a minor. It appeared at the trial that he went into the employment of the defendants in January, 1870, under a special contract to work for three years; that his work was "grinding bibbs;" that he agreed to work by the piece and was to receive nine cents for each bibb which passed inspection; and that he left in May, 1870. The defendants put in evidence to show that the work of the plaintiff which passed inspection during the time covered by the writ was only \$3.65, and claimed that he could recover only that amount. The Court ruled in effect that the plaintiff could avoid his express contract and recover upon a *quantum meruit*. If this ruling was correct, the accompanying instructions were sufficiently favorable to the defendants. In *Moses v. Stevens*, 2 Pick. 332, the subject was carefully considered, and the Court held that a special contract by a minor for his services was voidable, and that, upon avoiding it, he might maintain an action upon a *quantum meruit*, and recover a reasonable compensation for his services, as though no such contract had been made. In *Stone v. Dennison*, 13 Pick. 1, the minor, with the concurrence of his guardian, had made a contract to remain in the service of the defendant until he should arrive at the age of twenty-one years, for his board, clothing, and education. The Court held that the case was not within the general rule, that a minor cannot bind himself by his contracts, for want of legal capacity, but that the contract was for necessities, and being shown to be beneficial to the minor, he could not avoid it after it was fully executed on both sides. In

Vent v. Osgood, 19 Pick. 572, it was held that the contract of a minor to perform a whaling voyage was voidable, that it was avoided by his desertion during the voyage, and that he could recover a *quantum meruit* for his services.

The case at bar falls within the principle of *Moses v. Stevens*. The contract which the defendants seek to make binding upon the plaintiff is merely an executory contract for the plaintiff's services. The law gives him the privilege of judging whether it is beneficial or not, and of avoiding it if he so elect. Having avoided it, he is entitled to recover a *quantum meruit*, in the same manner as if he had worked for the defendants without any contract between them.

The defendants rely upon the case of *Breed v. Judd*, 1 Gray, 455. But that case is entirely unlike the case at bar. The substance of the contract was that the defendants were to furnish an outfit to the plaintiff to go to California; that the plaintiff was to furnish his labor and time; and that of the fruits of the enterprise two-thirds were to belong to the plaintiff and one-third to the defendants. The contract was fully executed on both sides; the plaintiff had sent forty-two ounces of gold dust to the defendants, being one-third of the avails of his labor, and, after he became of age, he brought this suit to recover the value of said gold dust, less the amount of the outfits expended on his account. The Court considered that the plaintiff, under the privilege of infancy, could have avoided his contract while it remained executory, but decided that the effect of avoiding it after it was executed, was not to change the relations of the parties, and to enable him to recover of the defendants as his own the third part which had vested in them as their proportion of the joint adventure. The contract was shown to be a beneficial one. Whether, if it had been a hard one, he could recover such share of the proceeds as would be a reasonable compensation for his labor, did not arise, and was not considered.

Upon the whole, a majority of the Court is of opinion that the rulings of the presiding Judge in this case were correct.

Exceptions overruled.

Ray v. Haines, 52 Ill. 485; *Venue v. Pinkham*, 60 Me. 142; *Whitemarsh v. Hall*, 3 Denio, 373.

HOW DISAFFIRMED.

The infant can disaffirm his contract for labor by any act or utterance expressing to the other party his purpose to renounce it.

VENT *v.* OSGOOD.

Supreme Judicial Court of Mass., 1837.

19 Pick. 572.

PUTNAM, J., delivered the opinion of the Court. The contract for the voyage was by an infant. It was made with the consent of his mother, after the death of his father, but her consent does not give any additional legal validity to the agreement. If the contract were binding, as if made by an adult, then upon the facts agreed the plaintiff must fail to recover, as he shipped for the performance of the whole voyage, and deserted the service at a foreign port, without any fault of the owners or master.

Whether a contract by an infant be void or voidable, or binding, is frequently a question of very difficult solution. If it be clearly prejudicial to him, it is void. If it may be for his benefit, or to his damage, it is voidable at his election, and he may avoid it during his minority, or when he becomes of full age. If the contract be clearly beneficial to him, he is bound. And whether the contract comes within one or other of these distinctions, is to be determined by sound judicial discretion: 2 Kent's Comm. (3d ed.) 236, and the authorities cited by him.

Those contracts of a binding character are such as come within the description of necessities; for example, for suitable food, clothing, education. And what is necessary or not, is to be tried by the Court: 1 Fonbl. 6, 8. And by analogy, the Court must determine what is to be considered so prejudicial as to render the contract void, and what circumstances "show a semblance of benefit sufficient to make it voidable only:" Zouch *v.* Parsons, 3 Burr. 1808. It is not possible to prescribe what shall be the result in each particular case which can arise,

so that it shall be clearly included under the one or the other rule applicable to contracts by infants. It must depend upon the circumstances of each case whether the contract be void, voidable, or binding.

Now we all think that the contract under consideration was voidable at the election of the infant. If the service were consonant with the health, taste, and enterprise of the infant, it might be very beneficial; otherwise it might be exceedingly prejudicial. The law allowed him the privilege or right to judge for himself in this matter, and the owners are supposed to know the law and to contract accordingly, just as if the law were written at large on the agreement.

Here was a trial of nearly two years, and then the infant left the service. He could not have adopted a more significant mode of avoiding the contract than by deserting. Nor are we at liberty to inquire as to the sufficiency of his reasons. The law allowed him the personal privilege of avoiding the contract if he pleased, and the owners must be supposed to have contracted with him upon that basis. They were to be bound; but the infant was to be at liberty to avoid the agreement.

This being a voidable contract, and having been avoided, we are to consider what is the legal result which should follow from the avoidance.

On the part of the plaintiff it is contended that he is to have a *quantum meruit* for his services.

On the part of the defendant it is contended that the effect of the avoidance was prospective merely, and that the plaintiff is not to recover for services rendered before the avoidance. And we are referred to several authorities; especially to the cases of *McCoy v. Huffman*, 8 Cowen, 84, and *Weeks v. Leighton*, 5 N. Hamp. R. 43. The Court, in the latter case, recognize the law as laid down in *Stark v. Parker*, 2 Pick. 267, that where a party has performed labor under a special contract which he has abandoned and refused to complete on his part, he shall not recover for such labor. And they think that the circumstance, that the plaintiff was an infant when he entered into the contract, makes no exception in the plaintiff's favor. They cite *Holmes v. Blogg*, 8 Taunt. 508, and *McCoy v. Huffman*, 7

Cowen, 184, to show that such is the law in England and in New York.

The case at bar must be determined by the common law relating to infants.

The case of *McCoy v. Huffman* is based upon *Holmes v. Blogg*; and the latter stands upon the dictum of LORD MANSFIELD in the case of the Earl of Buckingham *v. Drury*, 2 Eden's Ch. R. 60. The question in that case was, whether a woman, married, under twenty-one years of age, having before such marriage a jointure made to her in lieu of her dower, is barred of her dower within the statute of 27 Hen. 8. c. 10. The Judges differed in their opinions, delivered in the House of Lords; four were in the affirmative, and three in the negative. It was in that case that LORD MANSFIELD said, *arguendo*, "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." It was a mere dictum, which was not involved in the main question then to be decided. Indeed a jointure, by the most respectable authorities, is not to be considered as a contract. It is a provision for a livelihood. See LORD HARDWICKE's opinion in the case above cited.

We do not question the right of an adult to dispose of his property without any valuable consideration if he pleases. He may give away his money if he will, and cannot recover it back. But it would be a startling proposition that an infant is bound by such a payment. The law does not consider that he has discretion to state an account. He is bound by an account stated. If he pays over to the party with whom he is dealing ten times the amount of the account stated, for no consideration at all, is he bound by such payment? I put fraud out of the question in this discussion. If he binds himself for necessities, he is not bound by the amount of the bond or note; but the claim is to be settled just as it would have been if no bond or note had been given. The law allows him to contract for necessities, but it does not consider him to be of sufficient discretion to ascertain the amount. He is chargeable only for the real value.

And can the law allow the infant to pay away his money without consideration, without redress? Suppose that he

agrees with an adult to buy a ship or a farm for \$10,000, to pay half down, and the rest in sixty days, when the adult agrees to convey the property. In ten days he voids the contract. Shall the adult keep the ship or the farm, and the money advanced? We do not think that such is the law. If it were so, instead of covering him with a shield, it would put him to the sword.

The general rule is that infants may make valid contracts for necessities. They are protected against all other contracts. They may avoid such other contracts. What is meant by avoiding? We think the obvious meaning is the true and legal one. It is to nullify and render void *ab initio*, not prospectively. It is a total, not a partial destruction. If it were otherwise, the infant might and practically would be ruined by a part execution of the contract. A partial or prospective avoidance would afford no protection at all. By the avoidance the contract was annihilated, and the parties are left to their legal rights and remedies, just as if there had never been any contract at all.

The case of *Holmes v. Blogg*, cited from 8 Taunton, 508, is more fully reported in 2 Moore, 552. It was an action to recover £157 paid by the plaintiff for rent, in advance, for a building which the plaintiff, an infant and a partner of one Taylor, hired to carry on the business of bootmakers. The partners occupied until the infant became of age, when he avoided the contract. And there was no doubt but that he had a legal right to do.

The plaintiff gave up all connection with Taylor and quitted the premises. The Court held, that by the avoidance of the contract the plaintiff could only protect himself against the covenants to pay the rent to come, but no further; that he was not entitled to recover the money paid for the lease, although there might be a complete failure of consideration by subsequent events. GIBBS, C. J., said he had not been able to find any action analogous, except the case before cited, of *Buckingham v. Drury*; and he cited the dictum of LORD MANSFIELD, and said very truly that it went much beyond the case then under his consideration. Now we think it clear, that as the contract was avoided from the beginning, and as the case was to be determined by the principles of law independently of the

contract, the plaintiff was not entitled to recover back any more than the difference between the sum charged, and that which in equity ought to have been charged for the rent of the building which the plaintiff occupied during his infancy. There were some other considerations in that case, relating to the partnership, and whether or not the payment should be considered as made on partnership account, which were dismissed from the case, and it turned entirely on the right of the plaintiff to recover back money paid for rent of a building which he had occupied in his infancy. And upon sound legal principles the law would not give to the infant such a right, because it would enable him to convert his privilege into an engine of fraud. The law in such case, it seems to us, would have protected the infant from the payment of any greater sum for rent than the premises he occupied were reasonably worth. For the surplus (if any) the plaintiff was, we think, entitled to recover as being paid on a consideration which had failed. And it is no answer to this reasoning that the consideration failed by the act of avoidance of the contract, for that was the exercise of a legal right of the plaintiff. The case then was to be settled as if the plaintiff had occupied the defendant's premises on a promise to pay a reasonable rent, and if he had overpaid, he *was entitled* to recover the surplus. All money paid by one party to the other, on the contract which was made void by the infant, was paid on a consideration which failed. And even in the case of an adult, *a fortiori* in the case of an infant, an action would lie to recover it back.

And so where services have been performed or property delivered by the one to the other, under the expectation that the contract would be fulfilled, the case is to be adjusted and determined by the principles of law, independently of the contract, if it has been avoided.

Those principles, however, will not sanction any fraud on the part of the infant, but will hold him to answer *criminaliter* according to his mental power. He is not, as that most eminent and just Judge, LORD MANSFIELD, said, to convert the shield into a sword. If he has received money or property under the contract which he has avoided, he must restore it. He must, as far as possible, replace the party with whom he has been

contracting in the same situation in which he stood. And so that party must, in like manner, restore to the infant the money or property which has been received. If the infant, for example, has received goods for a particular purpose, which he has failed to perform, he must return the goods, or be liable to an action for them: Bingham on Infancy, 111. If he has occupied the buildings of the adult, he is liable for rent: 2 Bulstrode, 69.

We have thus far considered the case upon common-law principles and authorities having a direct bearing upon it, without reference to the cases of *Moses v. Stevens*, 2 Pick. 232; which cannot, we think, be distinguished in principle from the case at bar.

And upon the whole we are all satisfied that the case at bar was upon a voidable contract, that it was legally made void by the infant during his minority, and that he is entitled to maintain this action to recover a *quantum meruit* for his services.

EFFECT OF DISAFFIRMANCE.

When an infant disaffirms his contract for labor, the rights of the parties thereto are precisely the same as if the contract had never been made.

DEROCHER *v.* CONTINENTAL MILLS.

Supreme Judicial Court of Maine, 1870.

58 Maine, 217.

WALTON, J. The question is whether a minor, who has agreed to work for a manufacturing corporation at least six months, and not leave without giving two weeks' notice, but does leave without giving such notice, is liable to have the damages occasioned thereby deducted from the amount he would otherwise be entitled to recover for his labor.

We think not. To compel the minor thus to make good the loss occasioned by the non-performance of his contract, is virtually to enforce the contract; and thus to enforce the contract

is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defence amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated it, he must pay the damage. Such a doctrine cannot be maintained.

The decisions on this branch of the law furnish us with a curious and instructive illustration of the mischief that is liable to be done when Judges undertake to generalize too much, and to decide more than is presented by the cases then before them.

In a case before the House of Lords on Appeal, one of the questions was, whether an infant could, by contract, bar her dower. LORD MANSFIELD, in delivering his opinion, is reported to have said, "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again:" *Buckingham v. Drury*, 2 Eden, 60.

Relying upon this dictum, it was afterwards held in England that money advanced by an infant for a lease of real estate, which he afterwards avoided, could not be recovered back: *Holmes v. Blogg*, 8 Taunt. 508.

Relying upon the same dictum, and the above decision, it was afterwards held in New York, that where an infant does work in part performance of a contract, which he fails to complete, he cannot recover for it: *McCoy v. Huffman*, 8 Cowen, 84.

Similar decisions were made in Indiana and New Hampshire: *Harney v. Owen*, 4 Blackf. 337; *Weeks v. Leighton*, 5 New Hamp. 343.

But these decisions, and the dictum of LORD MANSFIELD (so clearly erroneous, that one is almost led to doubt whether he could ever have made it), have all been overruled.

In England, the dictum of LORD MANSFIELD, and the use made of it in *Holmes v. Blogg*, 8 Taunt. 508, were repudiated in *Corpe v. Overton*, 10 Bing. 252. In the latter case, the Court

held that money paid by an infant toward the purchase of a share in the defendants' business could be recovered back.

In New York, the decision in the 8th of Cowen was overruled in the 7th of Hill, 110 (Medbury *v.* Watrous). In the latter case, it was held that where an infant enters into a contract for the purchase of property, and performs work in part payment of the price, but avoids the contract on arriving at full age, he may recover for the work.

In Indiana, the decision in the 4th of Blackford, 387, was overruled in Dallas *v.* Hollingsworth, 3 Ind. 537.

In New Hampshire, the decision in the 5th of New Hampshire, 343, was overruled in Lufkin *v.* Mayall, 25 New Hamp. (5 Foster) 82. In the latter case, it was held that an infant who has avoided his contract for labor on the ground of infancy, may recover compensation for his services performed under it.

In Massachusetts, it was held that where an infant performs labor on a special contract, which he afterwards abandons, he may recover for his services, "as if no such contract had been made." This is undoubtedly the true rule of law. But in closing the opinion, the Court inserted one of those unfortunate dicta, apparently unconscious that it was utterly inconsistent with the rule just laid down, namely, that the rule would do no injustice, "because the jury would give no more than under all the circumstances the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract." "It seems," therefore, says the reporter in his syllabus of the case, "that if the employer is injured by the sudden termination of the contract without notice, a deduction should be made on that account." The Court just lay down the rule that the case is to be tried precisely as if no special contract had been made, and then add, in substance, that a deduction must be made for the breach of it: Moses *v.* Stevens, 2 Pick. 332.

In a later case in Massachusetts, the true rule is again stated, that by the avoidance of an infant's contract, it is annihilated *ab initio*, "and the parties are left to their legal rights and remedies just as if there had never been any contract at all;" and the absurd qualification annexed to it in the case just cited is, of course, omitted: Vent *v.* Osgood, 19 Pick. 572.

And in New York the qualification attempted (inadvertently, we have no doubt) to be engrafted upon the rule applicable to such cases was expressly overruled. The Court said they could not yield their assent to the soundness of such a qualification; and the Court held, that an infant plaintiff in such an action is entitled, by well-settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made: *Whitmarsh v. Hall*, 3 Denio, 375.

The dictum of LORD MANSFIELD, in *Buckingham v. Drury*, 2 Eden, 60, that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again;" and the remark in the opinion of the Court in *Moses v. Stevens*, 2 Pick. 332, that "the jury would make an allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract," are undoubtedly the cause of most, if not all, of the confusion to be found in the books on this branch of the law.

We think the rule of law, applicable to this class of cases, is correctly stated in *Vent v. Osgood*, 19 Pick. 572; and in the opinion of this Court in *Robinson v. Weeks*, 56 Maine, 102; and is substantially this, that when an infant's contract is legally avoided, the rights of the parties are precisely the same as if it had never been made.

Having avoided her contract to work not less than six months, and not to leave without giving two weeks' notice, the plaintiff had a right to have her case tried and determined precisely as if no such contract had ever been made. Yet her case was not thus tried. The defendants were allowed, first, to show that such a contract was made, then the breach of it, then the loss resulting to them by reason of its breach. They then had the amount of such loss deducted from the wages due to the plaintiff; and the loss being greater than the wages, the plaintiff's suit was defeated, and judgment ordered for the defendants. Surely that was not having the rights of the parties tried and determined precisely as if no such contract had ever been made; for if no such contract had ever been made, certainly no such result could have been reached.

Exceptions sustained.

New trial granted.

CONTRACTS OF MARRIAGE.

An infant's promise to marry is voidable, and hence may be disaffirmed.

RUSH *v.* WICK.

Supreme Court of Ohio, 1877.

31 Ohio St. 521.

BY THE COURT. The demurrer was rightfully overruled. A contract to marry made by an infant stands upon the same footing, as respects his right to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule that the contract of an infant is voidable at his election. The fact that under the statute (67 Ohio L. 6) an infant may be joined in marriage at the age of eighteen if a male, and sixteen if a female, having first obtained the assent of the father, or, in case of his death or incapacity, of the mother or guardian, does not affect the right to refuse to perform the contract.

The right to avoid or disaffirm the contract of an infant grows out of his supposed incapacity to protect himself from improvident bargains and relations. And there can be no case where the right to avoid or disaffirm is of more vital concern to his future welfare than where he has made an improvident marriage engagement. The infant's right to avoid such engagement or contract is affirmed by the following authorities: *Holt v. Ward*, 2 Strange, 937; *Cannon v. Alsbury*, 1 A. K. Marshall, 56; *Hunt v. Peake*, 5 Cow. 475; *Willard v. Stone*, 7 Id. 22; *Warwick v. Cooper*, 5 Snead, 659; *Pool v. Pratt*, 1 Chip. (Vt.) 252; Bac. Ab., title Infancy and Age, 135; 1 Chitty on Con. 222; Shouler's Domestic Rel. 535; MacPherson on Infants, 121.

Leave refused.

Hunt v. Peake, 5 Cow. 475.

II.

PERSONS NON COMPOS MENTIS.

(a) **INSANE PERSONS:** The attempted contracts of insane persons are regarded by the law as valid, voidable, or void.

VALID.

Such contracts, when executed, and for necessities supplied in good faith, are held by the law to be valid.

LA RUE v. GILKYSON.

Supreme Court of Pennsylvania, 1846.

4 Pa. St. 375.

GIBSON, C. J. Ever since the case of Stiles and West, cited in *Manby v. Scott*, 1 Sid. 109, it has been held that the executed contract of a *non compos mentis* for necessities, *bonâ fide* supplied, stands on the footing of an infant's contract for necessities. In *Baxter v. The Earl of Portsmouth*, 2 Car. & P. 178 (12 E. C. L. R.); s. c. 5 Barn. & Cress. 170, it was said that the word necessities is not to be restricted to articles of the first necessity, but that it includes every thing proper for the person's condition; and it was determined that to hire carriages to a nobleman who, though actually insane, voted in Parliament and went about as other men do, carried with it no mark of imposition. Why should not such a man be liable even for merchandise innocently furnished to his order in similar circumstances? To supply him with articles known to be improper for him would bear on the face of the transaction evidence of an attempt to take advantage of his infirmity, and he would not be liable for the price of them. Nor would he be bound by a contract unexecuted by either party. In the case

before us there is no difficulty on either of these heads. The credit given was for boarding and lodging, when the defendant's testator was destitute of a proper maintenance, as well as without a committee to provide it for him, and when his predicament was like that of a wife or child cast upon the world. The plaintiff ought therefore to have recovered.

Judgment reversed, and a venire de novo awarded.

SMITH ON CONTRACTS, 356, note.

Van Horn v. Hann, 39 N. J. L. 207 ; Sawyer v. Lufkin, 56 Me. 308 ; Reando v. Misplay, 90 Mo. 151.

The lunatic may even bind himself for luxuries furnished in good faith : Kendall v. May, 10 Allen, 59.

The husband is liable for necessities furnished his wife during the period of his insanity : Read v. Legard, 6 Exch. 636 ; 1 Wharton on Consec. 101 ; Jackson v. King, 15 Amer. Dec. 361, note ; s. c. 4 Cow. 207.

NOT FOR NECESSARIES.

Where a person of apparently sound mind, and not known to be otherwise by the other party, enters into a contract (not for necessities) which is fair and *bona fide*, and the contract is so far *executed* that the parties cannot be put *in statu quo*, such contract cannot be avoided by either the insane person or those that represent him, and hence is *valid*.

LANCASTER COUNTY BANK v. MOORE.

Supreme Court of Pennsylvania, 1875.

78 Pa. St. 407.

PAXSON, J. The law is well settled that persons who are not *sui juris*, and have no general capacity to contract debts, are nevertheless liable for their torts, and may bind themselves for necessities. Such rule rests upon principles of sound public policy. To deny the latter branch of the proposition might in some instances deprive persons laboring under such disabilities of the means of subsistence. In *La Rue v. Gilkyson*, 4 Barr,

375, it was held that the executor of a lunatic was liable for necessities furnished to his testator while *non compos mentis*, and before the appointment of a committee. In that case the articles furnished came within the most rigid rule as applied to necessities, such as board, washing, &c., but Chief Justice GIBSON, who delivered the opinion of the Court, cites approvingly *Baxter v. Portsmouth*, 2 C. & P. 178, in which it was held that the word "necessaries" (furnished to a lunatic) "is not to be restricted to articles of the first necessity, but that it includes everything proper for a person's condition; and that to hire carriages for a nobleman who, though actually insane, voted in Parliament, and went about as other men do, carries with it no mark of imposition." As it was also strongly intimated that such a man would even be liable for merchandise innocently furnished to his order under such circumstances. It is true, the latter point was not before the Court, and the expression referred to is but dictum, but the mere dictum of so eminent a jurist as the late Chief Justice GIBSON is entitled to respect: *La Rue v. Gilkyson* was followed by *Beals v. See*, 10 Barr, 56, in which it was held that an executed contract by a merchant for the purchase of goods before the day from which the inquest found him to have been *non compos*, could not be avoided by proof of insanity at the time of the purchase, unless there had been a fraud committed on him by the vendor, or he had knowledge of his condition. There was proof in the case cited that the goods purchased were unsuited to the object for which they were purchased; that the price agreed upon far exceeded their market value, and that plaintiff had tendered them back to the defendants, who declined receiving them, whereupon they were sold at auction after notice. Says GIBSON, C. J.: "Should he have made a wild and unthrifty purchase from a stranger unapprized of his infirmity, who is to bear the loss incurred by one of the parties to it? Not the vendor, who did nothing that any other man would have not done. As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity as he is liable to bear his misfortunes, on the principle that when a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without

showing it, and when such a man goes into the market, makes strange purchases and anticipates extravagant profits, what are those who deal with him to think? To treat him as a mad-man would exclude every speculator from the transactions of commerce." It will be observed in this case that the goods were purchased two days prior to the day from which the inquest found the purchaser insane, and the transaction was not, therefore, covered by the finding. But the Court do not rest their decision upon this ground, but treat it as the purchase of an insane man—insane at the time of the purchase. Such was evidently the view taken of the case in *Nace v. Boyer*, 6 Casey, 99, in which the late Chief Justice WOODWARD says: "In *Beals v. See*, 10 Barr, 56, this Court held that an executed contract by a merchant for the purchase of goods could not be avoided by proof of *insanity at the time of the purchase*, unless a fraud was committed on him by the vendor, or he had knowledge of his condition." The principles decided in *La Rue v. Gilkyson*, and *Beals v. See*, are recognized in *State Bank v. McCoy*, 19 P. F. Smith, 204.

We will apply these principles to the facts of this case. George H. Moore, the defendant and alleged lunatic, resided in Lancaster County, about six miles from Lancaster city, where the plaintiff's corporation is located. He was a man of some property, was about fifty-four years of age, and to some extent, at least, had managed his own pecuniary affairs. There was not a scintilla of proof that the bank had any knowledge of his mental imbecility. On December 30, 1871, he called at plaintiff's bank, in company with B. M. Stauffer, a resident of Mount Joy, Lancaster County, for the purpose of obtaining a discount, when two notes were drawn up, one for \$225 and the other for \$775, signed by the said George H. Moore, to the order of Stauffer, and by him endorsed. The two notes were both discounted, and the money placed to the credit of Moore and checked out by him. There is no allegation that the money thus obtained was used improvidently; in fact, the evidence tends to show that it was applied to the payment of his debts. Nor was there anything in his manner or conversation to put the officers of the bank on their guard as to his mental condition. On June 5, 1872, a petition *de lunatico inquirendo*

was presented against George H. Moore, and after the usual proceedings, an inquisition was returned on August 10, 1872, finding that the said Moore was a lunatic, and had been so for about three years last past, and had no lucid intervals. This inquisition was traversed on October 25, 1872, by John M. Hershey, a creditor. Said traverse was pending at time of the trial in the Court below.

In *Beals v. See*, as before observed, the day when the goods were sold was not covered by finding of the inquest. Here the inquisition shows Moore to have been a lunatic at the time the note was made and discounted by the bank. The record of the proceedings in lunacy was admitted in evidence at the trial in the Court below, and was undoubtedly *prima facie* evidence of Moore's insanity. But we are unable to see how this affects the case. *Beals v. See* was decided upon the express ground that the merchant was liable, notwithstanding his insanity, upon an executed parol contract, in the absence of fraud in the transaction, and of knowledge on the part of the vendor of his insanity. The most that the inquisition amounted to, was to establish a *prima facie* case of insanity when the contract was made. But the broad principle decided in *Beals v. See* was that the insanity, when established, was not, under the circumstances, a defence.

The soundness of this rule is too apparent to need any extended vindication. Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms, and produces such opposite effects, as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with a particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man, without betraying in manner or conversation the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties, and retain both the property and its price. Here the bank in good faith loaned the defendant the money on his note; the contract was executed so far as the consideration is concerned, and it would be alike derogatory to sound law and

good morals that he should be allowed to retain it to swell the corpus of his estate.

It will be seen that the fact that the bank had no notice of the defendant's insanity is an important element in the case. The proceedings in lunacy were not commenced until after the note was discounted, and the plaintiffs were not even affected with constructive notice. We limit our decision in this case to its own facts, and do not decide the case of a contract made during proceedings in lunacy or after inquisition found. We leave the effect of *lis pendens* in such a case until the point is raised. Nor does this decision apply to conveyances of land or other instruments under seal.

From what has been said it will be seen that the learned Judge erred in his answer to the plaintiff's first point. Said point should have been affirmed in the terms in which it was presented.

There was also error in that portion of his charge referred to in the seventh assignment of error. The jury should have been instructed that if there was no fraud in the transaction, and the bank had no notice of defendant's insanity, the verdict should be for the plaintiffs.

There was also error in the admission of the evidence referred to in the third assignment. It is true its admission would seem to be sustained by the dictum in *Rogers v. Walker*, 6 Barr, 375. But the point did not arise in that case, and the remark referred to was evidently used by way of illustration. We are unable to see how the neighborhood reports of Moore's insanity could possibly have been legitimate evidence in this case. If offered to affect the bank with notice of his insanity, it was not competent, for the reason that the reports were not brought home to the bank. If offered to prove the distinct fact of Moore's insanity, it was clearly inadmissible. It was at best mere hearsay, and no amount of such evidence could legally establish such fact.

Judgment reversed, and a venire facias de novo awarded.

SMITH ON CONTRACTS, 359.

Abbott v. Creal, 56 Iowa, 175; *Behrens v. McKenzie*, 23 Ia. 333; *Matthiessen R. Co. v. McMahon*, 38 N. J. L. 537; *Shoulters v. Allen*, 51 Mich. 529; *Young v. Stevens*, 48 N. H. 133; *Beaven v. McDonnell*, 9

Exch. 309 ; 1 Wharton on Con., sec. 406. But see *Lincoln v. Buckmaster*, 32 Vt. 658.

The law which protects the insane person shall not be employed by him to injure others : *Mutual Life Insurance Company v. Hunt*, 79 N. Y. 541.

Contracts made during a lucid interval are valid : *Lilly v. Waggoner*, 27 Ill. 395.

VOIDABLE.

The attempted contracts of insane *persons*, *not for necessities*, are as a general rule regarded by the Courts as *voidable* on the part of the insane person.

ALLIS v. BILLINGS.

Supreme Judicial Court of Massachusetts, 1843.

6 Met. 415.

DEWEY, J. The question raised in the present case is whether the deed of one who is insane at the time of the execution thereof is void absolutely or merely voidable.

The term "void," as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from "voidable;" it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms "void" and "voidable," in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required the term "void" can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification.

This question then arises : Is the deed of a person *non compos mentis* of such a character that it is incapable of confirmation ? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in

judicial opinions. Mr. Justice BLACKSTONE, in his Commentaries, Vol. II. p. 291, states the doctrine thus: "Idiots and persons of non-sane memory, infants, and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable, but not actually void." Chancellor KENT says, "by the common law, a deed made by a person *non compos* is voidable only, and not void:" 2 Kent. Com. (4th ed.) 451. In *Wait v. Maxwell*, 5 Pick. 217, this Court adopted the same principle, and directly ruled that the deed of a *non compos*, not under guardianship, was not void, but voidable. Such a deed conveys a seizin to the grantee, and the deed to that extent is valid, until by entry or action the same is avoided. *Mitchell v. Kingman*, 5 Pick. 431, is to the like effect. In *Seaver v. Phelps*, 11 Pick. 305, the contracts of insane persons are noticed as contracts not absolutely void, but voidable.

It may seem somewhat absurd to hold that a deed should have any effect when wanting in one of the essential elements of a valid contract, viz., that of parties capable of giving an assent to such contract. But this objection as strongly applies to cases of deeds executed by infants, who are alike wanting in capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it to some present purposes effectual and susceptible of complete future ratification, is well settled and understood as to infants who enter into contracts; and it will be found that there is a common principle on this subject, alike applicable to the inability of a contracting party, arising from lunacy or infancy. The civil and the common law writers group together idiots, madmen, and infants as parties incapable of contracting for want of a rational and deliberate consenting mind: 1 Story on Eq. § 223, and authorities there cited.

It is true that the rule of the common law as held at one time seemed to sanction in one particular a most unwarrantable distinction between the cases of deeds made by persons *non compos* and those made by infants; holding that the former could not be avoided by the party, upon the ground that no man of full age should be admitted to stultify himself, although

it allowed privies in blood, or privies in representation, after the death of the *non compos*, to avoid the deed, on the ground of incapacity in the grantor. This distinction has not been adopted by our Courts. On the contrary, we hold that such conveyance by one *non compos mentis* may be avoided by himself, as in the case of an infant grantor. This principle was directly recognized in the case of *Mitchell v. Kingman*, 5 Pick. 481. Indeed, the English rule has in modern times been often questioned in England; and in the Courts of our sister States it has received little if any sanction: 1 Story on Eq. § 225, and cases there cited.

It was urged by the demandant's counsel that the doctrine that the deed of a *non compos* person was voidable only, and not void, was to be limited to feoffments, or cases where there is livery of seizin, or what is equivalent, and would not embrace a conveyance by an unrecorded deed. But we do not think that such a distinction can be maintained. As between the grantor and grantee such unrecorded deed is good and effectual by force of our statute; and the effect of such a conveyance would be to vest the title of the grantor in the grantee immediately upon the execution of the deed, and before the same is recorded: *Marshall v. Fisk*, 6 Mass. 81. A deed made in proper form and duly acknowledged and recorded is in this Commonwealth equivalent to a feoffment with livery of seizin: *Somes v. Brewer*, 2 Pick. 197. Without the registry, where the delivery of the deed is accompanied by the surrender of the possession of the conveyed premises to the grantee, the effect would be the same, as to the conveyance by a *non compos*, as would result from a feoffment made by him. A deed of bargain and sale, it is said, places the grantee upon the footing of a feoffment, as it passes the estate by the delivery of the hand; such grants or deeds as take effect by delivery of the hand being voidable only: *Somes v. Brewer*, 2 Pick. 197; *Zouch v. Parsons*, 3 Bur. 1804. We come therefore to the result that the deeds of infants and insane persons are alike voidable, but neither are absolutely void.

Upon the trial of the present action the plaintiff put his case upon two distinct grounds: 1st. That he was insane at the time he executed the deed under which the tenant derives

his title ; 2d. That the deed was obtained by undue influence and fraud on the part of the tenant. Upon both these points the plaintiff introduced evidence. What was the extent of the evidence upon the latter ground, and what would have been the finding of the jury upon that point, we have no means of judging. This was a distinct and independent ground, and one which, if found in favor of the demandant, might have been decisive of the case, but which, in the final disposition of the cause, was not considered or passed upon by the jury. All the evidence, therefore, bearing upon this point, is now to be treated as if never offered, and the sole inquiry for our consideration is, whether the instructions of the Court were such, in matter of law, that the verdict may be maintained, taken as it was upon the first ground solely.

The presiding Judge ruled, as a matter of law, that a deed of an insane person was absolutely void. Under this ruling all that was required of the demandant to entitle himself to a verdict in his favor was to show a temporary insanity at the time of the execution of the deed. No matter what might have occurred subsequently, or how soon afterwards the demandant might have been restored to a sound mind ; no matter what acts of confirmation may have been done by him, or however fully he may have adopted and ratified the transaction by the receipt of money or other valuable consideration paid for the land, still the legal title in the land would be in him. This was the necessary result of the doctrine that the deed of a *non compos* was absolutely void, while, if it had been held only voidable, these subsequent acts of the party might materially affect the verdict of the jury. But adopting, as we do, the principle that the deed of an insane person is only voidable, this, while it gives the insane grantor full power and authority to avoid his deed, and thus furnishes full protection to him against all acts injurious to his interests done while he was *non compos*, also entitles the other party to set up the deed if he can show a ratification or adoption of it by the grantor after he is restored to a sound mind. If the grantor, when thus capable of acting, and with full knowledge of his previous acts, and of the nature and extent of them, will deliberately adopt and ratify them ; if he will knowingly, and in the exercise of

his proper faculties, take the benefit of a contract made while he was insane; it is competent for him to do so. But the consequence will be to give force, effect, and legal validity to his contract, which was before voidable.

In the present case, therefore, upon the point first relied upon in the defence, viz., that the demandant was insane when he executed the deed, the jury should have been instructed that this fact, if established, rendered the deed voidable, and that it was competent for the demandant to avoid it on that ground if not estopped by his subsequent acts, done while in his right mind; but that a voidable deed was capable of confirmation; and that if the grantor in his lucid intervals, or after a general restoration to sanity, then being of sound mind, and well knowing and understanding the nature of the contract, ratified it, adopted it as a valid contract, and participated in the benefits of it, by receiving from the purchaser the purchase-money due on the contract, this would give effect to the deed, and render the same valid in the hands of the grantee, and would thus become effectual to pass the lands, and divest the title of the grantor. Such instructions would have presented the question in issue in a different aspect to the jury, and might have led to a different result upon the only point upon which they passed.

Verdict set aside, and a new trial granted.

Regarding promissory notes: *Allin v. Berryhill*, 27 Iowa, 534; *Carrier v. Sears*, 4 Allen, 336; *Burke v. Allen*, 29 N. H. 106.

Regarding attorney's fees: *Hallett v. Oaks*, 1 Cush. 296.

Regarding conveyances: *Burnham v. Kidwell*, 113 Ill. 425; *Ingraham v. Ralwin*, 9 N. Y. 45; *Eaton v. Eaton*, 37 N. J. L. 108; *Hovey v. Hobson*, 53 Me. 451; *Boyer v. Berryman*, 123 Ind. 451; *Crouse v. Holmes*, 19 Id. 30.

Such contract is binding upon the sane, but not upon the insane party: *Allen v. Berryhill*, 27 Ia. 534.

See dissenting opinion.

But see *Dexter v. Hall*, 15 Wall. 9.

VOIDABLE CONTRACTS RESPECTING REALTY.

A deed executed by an insane person, not under guardianship, transfers the title and is simply *voidable*.

HOVEY v. HOBSON.

Supreme Judicial Court of Maine, 1866.

53 Maine, 451.

APPLETON, C. J. On July 27, 1835, Stephen Neal, then owning the land in controversy, conveyed the same to Samuel E. Crocker, from whom the tenant by various *mesne* conveyances derives his title.

On December 28, 1836, Stephen Neal died, leaving Lydia Dennett, then wife of Oliver Dennett, his sole heiress at law. On December 18, 1851, Oliver Dennett died.

On July 15, 1858, Lydia Dennett conveyed the demanded premises to the plaintiff.

The plaintiff introduced evidence tending to show that Stephen Neal at the date of his deed to Crocker was insane, and claimed to avoid said deed by reason of such insanity.

After the testimony reported had been introduced, the presiding Justice ruled "that, if Samuel E. Crocker without fraud, for an adequate consideration, purchased the land of Stephen Neal, and afterwards said Crocker and those claiming under him conveyed said land in good faith until it came into the hands of the tenant, for a valuable consideration, without any knowledge on his part of any defect in the title, or of any right or claim of any other person therein, then Mrs. Dennett or those claiming under her could not avoid her father's deed *as against the defendant*, on the ground of his unsoundness of mind; and that the tenant would be entitled to a verdict."

If Crocker, "without fraud, for an adequate consideration, purchased the land of Stephen Neal," Neal being sane, his grantees would undoubtedly acquire a good title. The ruling is that, if insane, the same result would follow, the grantees of Crocker being *bona fide* purchasers, and ignorant of the insanity

of Neal. The questions therefore arise (1) as to the rights of an insane man when restored to sanity, or of his heirs to avoid, as against his immediate grantee, his deed executed and delivered when insane; and (2) as to the rights of those deriving a title in good faith without notice, and for a valid consideration from such grantee.

1. The deed of an insane man not under guardianship is not void but voidable, and may be confirmed by him if afterwards sane, or by his heirs. If under guardianship, the deed is absolutely void: *Wait v. Maxwell*, 5 Pick. 219. The right of avoiding a contract exists, notwithstanding the person with whom the insane man contracted was not apprized of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception: *Seaver v. Phelps*, 11 Pick. 304. So an infant may avoid his contract, though the person dealing with him supposed him of age: *Van Winkle v. Ketcham*, 3 Caines, 323; or even when he fraudulently and falsely represented himself of age: *Conroe v. Birdsall*, 1 Johns. Cases, 127. The deed of an insane man being voidable, he may ratify it after he becomes sane, or his heirs after his decease: *Allis v. Billings*, 6 Met. 415. An insane person or his guardian may bring an action to recover land of which a deed was made by him while insane, without first restoring the consideration to the grantee, the deed not having since been ratified nor confirmed: *Gibson v. Soper*, 6 Gray, 279. In this case, the remark of SHAW, C. J., in *Arnold v. Richmond Iron Works*, 1 Gray, 434, that if "the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must first restore the price, if paid, or surrender the contract for it, if unpaid," is limited and restricted by THOMAS, J., "to the case of a grantor having in his possession the notes which were the consideration of the deed, and restored to the full possession of his mind." In the deed or other contract of an insane man the consenting mind is wanting. "To say that an insane man," observes THOMAS, J., "before he can avoid a voidable deed, must first put the grantee *in statu quo*, would be to say, in effect, that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was

when the bargain was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming, when with restored intellect he shall seek its annulment." Lunatics and persons *non compos* are not bound by their contracts, though no fraud nor imposition has been practised on them: *Chew v. Bank of Baltimore*, 14 Maryland, 318.

The ruling presupposes a sale without fraud and for an adequate consideration. That a grantor sold his land for a fair price, that the purchase-money was fully secured, that in the transaction he evinced by his conduct a knowledge of the value of his property and capacity in its management, would go far to negative an utter incompetency to contract, inferable only from a loss of memory common to old age or from a disregard of the decencies or courtesies of life. So the conversion by a feeble old man past labor, of property unproductive and burdened by taxation, into notes well secured and bringing an annual income, would hardly be deemed proof of utter imbecility, if the price was equal to the fair market value of the property sold.

As the deed of an insane man is voidable only, it follows that it is capable of subsequent ratification by the grantor if he be restored to reason, or by his heirs. The retention of the notes after such restoration and the reviving payments on them, would be evidence of such ratification. In the analogous case of infancy, it seems that there may be an acquiescence by the grantor under such circumstances as would amount to an equitable estoppel. In *Wallace's Lessee v. Lewis*, 4 Harrington, 75, it was held, that an infant's acquiescence in a conveyance for four years after age and seeing the property extensively improved, would be a confirmation. Though mere lapse of time will not amount to a confirmation, unless continued for twenty years, yet in connection with other circumstances it may amount to a ratification: *Cresinger v. Welch*, 15 Ohio, 156; *Wheaton v. East*, 5 Yerger, 41. Whether, in the case before us, the deed of Stephen Neal has been affirmed by the reception,

by those authorized, of the purchase-money for the land, or the heir-at-law after the death of her husband or the passage of the law in relation to married women is equitably estopped by her omission to act under circumstances which required action on her part, are questions which at this time are not pressing for consideration.

It is true the English Court adopt a somewhat different doctrine from that of the American Courts as to the right of an insane man when sane, or of his heirs, to avoid a deed or contract executed when insane. Thus, in *Selby v. Jackson*, 6 Beavan, 200, LORD LANGDALE refused to set aside a deed executed in good faith by an insane man and for an adequate consideration, when the parties could not be reinstated. "There are," observes TUCK, J., in *Chew v. Bank of Baltimore*, 14 Maryland, 318, "many cases in England to show that such persons are held by their contracts unless fraud and imposition have been practised, but to this we cannot assent. The doctrine in this country is the other way, and, as we think, is sustained by better reasoning than the English rule as announced in some of their decisions. The effect in many cases would be to place lunatics on the same footing with persons of sound mind, with less effective means to protect the injured party against the fraud, for at law, as well as in equity, fraud or imposition may be relied on, without reference to the mental capacity of the parties except so far as such defect may give weight to other facts, from which the fraud may be deduced."

The ruling, however, in the case at bar, is not in accordance with that of the English Courts, which require that, in addition to good faith and a full consideration, the persons contracting should be apparently of sound mind, and not known to be otherwise to the party with whom he contracts: *Molton v. Camroux*, 2 Exch. 487. These elements are not required by the ruling under consideration.

2. It is insisted, even if the deed of Neal might have been avoided as between the original grantor and grantee, that this right of avoidance ceases when the title has passed into the hands of third persons in good faith, for an adequate consideration, and ignorant of any facts tending to impeach such title.

It is apparent that the protection of the insane and the

idiotic will be materially diminished if the heirs cannot follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person.

The acts of lunatics and infants are treated as analogous, and subject to the same rules: *Key v. Davis*, 1 Maryland, 32; *Hume v. Barton*, 1 Ridg. Pl. 77. "The grants of infants and persons *non compos* are parallel both in law and reason:" *Thompson v. Leach*, 3 Mod. 310.

The law is well settled that a minor when of age may avoid his deed given when an infant. He may do this not merely against his grantee, but he may follow the title wherever it may be found and recover his land. "It may be objected," observes MARSHALL, J., in *Myers v. Sanders' Heirs*, 7 Dana, 524, "that these restrictions upon the right of an adult to avoid his deed obtained by fraud are inconsistent with the principle which allows an infant to avoid his deed, into whose hands soever the bill may have passed and without regard to time, except as a statutory bar running after he becomes of age. But, waiving the inquiry how far the mere acquiescence of an infant grantee after he becomes of age may determine his right of revoking his title from the hands of a purchaser for value, who has acquired it after such acquiescence, we think the analogy between the cases is too slight to have any decisive influence upon the present question. The right of an infant to avoid his deed is an absolute uncontrollable privilege, founded upon an incapacity conclusively fixed by the law to bind himself absolutely by deed or to pass an indefeasible title. These principles are irreversibly fixed by the law, and it enforces them without inquiring into particular circumstances and without regard to consequences. It must do so in order to maintain them. The right of an adult grantor to avoid his deed for fraud stands upon an entirely different basis. It grows out of the particular circumstances; it is founded in a regard to justice between man and man; it is given as a remedy for the hardship of his case. In its very foundation and essence it is limited by the justice which is due to others, and therefore cannot be exercised without a regard to their rights and interests."

"But again, infancy is not, like fraud, a circumstance wholly

extraneous from the title. The deed shows who the grantee is; the purchaser knows that an infant grantee cannot pass an indefeasible title; he is bound to know the identity of the person, who assumes to convey the title; and it is not an unreasonable requisition that he shall know whether the grantee under whom he claims title is under incapacity or not. In this view of the subject, no purchaser under an infant's deed is innocent in the eye of the law until the title has been confirmed by the matured consent of the grantor." In *Bool v. Mix*, 17 Wend. 119, the suit was against one claiming by a title derived from the grantee of the minor, but the ground was not taken that in consequence thereof the tenant had an indefeasible title. The principles applicable to deeds voidable for the infancy of the grantor are equally applicable where the grantor is insane. When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title—and he does convey such title to all *bona fide* purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee, whose title is thus derived, must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee: 1 Amer. Leading Cases, 259.

Exceptions sustained.

The case to stand for trial.

1 Devlin on Deeds, sec. 73. and cases cited; *Burhnam v. Kidwell*, 113 Ill. 425; *Eaton v. Eaton*, 37 N. J. L. 108; *Allis v. Billings*, 6 Met. 415; *Boyer v. Berryman*, 123 Ind. 451.

RATIFICATION.

A deed executed and delivered while the grantor is insane may be ratified or disaffirmed by him when restored to his right mind.

ARNOLD *v.* RICHMOND IRON WORKS.

Supreme Judicial Court of Massachusetts, 1854.

1 Gray, 434.

SHAW, C. J. The present case is so like the recent case of *Allis v. Billings*, 6 Met. 415, in all its essential features, that it seems hardly necessary to do more than cite that case. It was there held that when a deed conveying land had been duly signed, sealed, delivered, and acknowledged, and placed in a condition to be put on record, by one of unsound mind, and cash and notes had been given by the grantee in security and satisfaction for the price, such deed was voidable and not void; and that if afterwards, and after the grantor was restored to his right mind, he did acts deliberately, manifesting an intention to ratify and confirm the transaction of sale and conveyance, he could not afterwards avoid that deed by alleging that he was insane when he made it. Such a deed, to many purposes, is equivalent to a feoffment with livery of seizin; and we believe it has long been held by the rules of the common law that such a feoffment would pass a seizin *de facto*, and vest the estate in the feoffee, subject to be avoided by matter of record, entry, or by some of the modes allowed by law for avoiding and annulling the effect of such a conveyance. To this extent the rule would seem to be founded on the plainest principles of justice as well as law. In such case the conveyance of an estate by bargain and sale on the one side, and by the payment or contract for the payment on the other, constitute one entire transaction, mutually conditional and dependent. It must be affirmed or avoided as a whole. It cannot be affirmed in part, so as to hold the price, and disaffirmed in part, so as to avoid the conveyance: *Badger v. Phinney*, 15 Mass. 359.

If then the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must restore the price, if paid, or surrender the contract for it if unpaid. In short, he must place the grantee in all respects as far as possible in *statu quo*. To that extent the case of *Allis v. Billings* does go, and we think it is well sustained by the authorities cited. We say nothing here of a bond, covenant, or other instrument purely executory, where the obligation arises solely from the act of a disposing mind, binding a person to some obligation or duty, and under which no estate or property has passed or been transferred ; nor, if such a contract would be voidable and not void, do we consider here what acts, either of record or *in pais*, would be sufficient on the part of the party contracting, after being restored, to avoid or to confirm such contract. Such a case may depend upon its own peculiar circumstances, to be judged of as they arise. The case of *Allis v. Billings* is one where a party, restored to his right mind, having a full *jus disponendi*, and full capacity to judge and act in the conduct of his affairs, finding what had occurred whilst his mind was under a cloud, balancing the advantages to himself of reclaiming his land or holding the price, prefers the latter. By doing this he necessarily affirms the deed by which he in terms alienated his land.

In the very full argument offered by the counsel for the plaintiff in this case, it was suggested rather than distinctly proposed to the Court, to revise the case relied on, on the ground that there were authorities deserving of consideration leading to a contrary result. Undoubtedly there have been various views taken of this difficult subject, and there may be some discrepancy in the cases, especially whilst the maxim prevailed that no man could stultify himself, or in other words could plead his own insanity to avoid his acts and contracts ; a maxim founded mainly on considerations of policy, from the danger that men might feign past insanity, and be tempted to procure false testimony to establish it, in order to avoid and annul their solemn obligations and contracts. But on a re-examination of the authorities we see nothing to raise a doubt that the law as it now stands is correctly declared in that case.

It was urged that the terms "void and voidable," as applied to the deed of a person *non compos*, do not express the true distinction, but that there may be an intermediate class of deeds confirmable, that is, deeds made by one having no capacity to contract, and so void until confirmed by the party after being restored. To say nothing of the practical inconvenience of making the operation of a deed to transfer an estate depend on some act done months, perhaps years, after it has been delivered and recorded, some acceptance of payment, or other act *in pais*, passing between the parties without record or other means of notoriety; it would afford no more means of security to the rights of the party under disability than the power of refusing to ratify and actually disaffirming the deed, when the powers of his mind and his disposing capacity are fully restored. We are therefore of opinion that the referees decided correctly in holding that the deed of the plaintiff, made whilst in an unsound state of mind, was voidable and not absolutely void, and as a necessary legal consequence, that it was capable of being ratified and confirmed by him after his mind was restored.

Perhaps our duty would properly stop here, the above being apparently the only question of law raised by the report, and the subsequent question of actual ratification of the conveyance by the plaintiff being a question of fact for the referees. The weight of the evidence is no doubt a question of fact; the argument perhaps raises a question of law upon its competency, and as such we may consider it.

The acts necessary to be done to affirm and ratify a prior voidable act, or to annul it and set it aside, may be various, according to the nature of the act to be thus affirmed or disaffirmed, and to the condition and capacity of the party doing the act. In *Tucker v. Moreland*, 10 Pet. 58, it was held that in the analogous case of an infant, he might avoid his act, deed, or contract by different means, according to the nature of the act or the circumstances of the case. One of the cases put is where an infant makes a lease; the receipt of rent, after he comes of age, is a ratification: *Bac. Ab. Infancy & Age*, I. 8.

In the present case, after the plaintiff was restored to the full possession of his reason he found that he had executed a conveyance of his estate, that the defendants were in possession

under his deed ; also, that he held certain notes for part of the purchase-money. His forbearing to enter, his giving no notice of his election to disaffirm the conveyance, would be negative acts, and perhaps equivocal ; but his demanding and receiving payment of the notes was affirmative, significant, and decisive. It was inconsistent with any just purpose to disaffirm the conveyance. Payment and acceptance of the compensation are decisive of an election to affirm : *Butler v. Hildreth*, 5 Met. 49 ; *Norton v. Norton*, 5 Cush. 530. The defendants had no election to avoid the conveyance ; they were bound to pay their notes to the plaintiff on his demand. Had he brought his action on them and obtained judgment, such judgment would have been record evidence of his affirmance of the conveyance. Is actual payment to him less efficacious ? In the case of *Norton v. Norton*, which respected a conveyance in fraud of creditors by a deceased intestate, where a part of the purchase-money had been received by the administrator, it was stated that if payment had been received by the administrator with full knowledge of all the facts, and if the administrator was the party in interest, like the heir, it might have been a ratification.

The only remaining question is whether these payments were received by the plaintiff with such a knowledge of the facts as to make his acts binding. Upon this point the referees report that before and at the time of the payments made to the plaintiff himself, in April, 1844, he well knew that the defendants were in possession of the ore beds under his said deed ; that he well knew the nature and effect of that conveyance ; that he received these payments well knowing and understanding that they were part of the purchase-money given by the defendants for the conveyance of the premises to them by his said deed. This we think was competent, and we may add strong evidence from which to infer an intent to ratify. We must bear in mind in this inquiry that we are now considering the validity of the act and contract of a sane person, with full power of buying and selling, of judging of his rights and interests and managing his affairs, in doing an act freely and without compulsion or fraud. The law proceeds on the assumption that every man so situated, acting without fraud or duress, and knowing the facts upon which such act will operate, is bound by the necessary and

legal effects and consequences of such act, and so is bound by his contracts according to their ordinary import and construction. It was argued that the plaintiff should not be bound in such case of the ratification of a contract made whilst of unsound mind, without affirmative proof that he knew that he had the power of avoiding his deed, and that by demanding and receiving payment of his notes he would relinquish that power. This is not tenable unless a man of sane mind may set up his ignorance of the law to excuse himself from liability on his contracts. Could a man who should give a promise in writing to pay a debt of more than six years standing, avoid his acknowledgment and promise by averring that he did not know that in point of law he had a good bar to the note on the Statute of Limitations? It seems to us not. We think the law presumes that every man of competent capacity to make contracts, either by his knowledge or by the aid of legal counsel, or such other aid and advice as he may avail himself of, knows enough of the law to make valid contracts; and, at all events, the law will not allow such an excuse to exempt him from the obligations of his contracts. The evidence reported being in our opinion competent, and the referees having found it sufficient to establish a ratification, the award we think was right upon both grounds.

Judgment on the award.

Valpey v. Rea, 130 Mass. 384.

Such conveyance is binding upon the grantee until it is avoided by the grantor or his representatives : *Howe v. Howe et al.*, 99 Mass. 98.

AVOIDANCE.

In order to avoid his deed, made while insane, the grantor must *restore the consideration*, if the grantee acted in good faith and without fraud.

BOYER *v.* BERRYMAN.

Supreme Court of Indiana, 1890.

123 Ind. 451.

ELLIOTT, J. The appellant in his cross-complaint asserts title to the real estate described in it, and the appellee, who had brought an action for possession, dismissed his complaint, and the cause was tried upon the issues joined on the cross-complaint.

The appellant requested the Court to direct the sheriff to fill vacancies in the jury by summoning persons outside of the Court-room, but the request was denied. In this there was no error.

The record and proceedings in a former action between the parties were properly admitted in evidence. The Court in which the action was tried had jurisdiction of the subject and of the parties, and the judgment was not void even if it be true, as the appellant asserts, that the Court erred in referring the controversy to a master commissioner or referee. Where there is jurisdiction of the subject and of the parties, a judgment is not void, although the record and proceedings may abound in errors.

The second instruction given by the Court reads as follows: "If the plaintiff, Boyer, was insane at the time he executed the deed in question (if he did execute it), that fact alone would not enable him to set it aside. The deed of an insane person is not void, unless such person has been adjudged to be insane by a Court of competent jurisdiction. It is only voidable, and it depends upon other circumstances whether it can be avoided or not. If Berryman paid Boyer a valuable consideration for

the deed, and at the time had no knowledge of his insanity (if he was insane), and there was nothing in his appearance or conversation to indicate that he was insane, and the contract was fair, then he would have no right to have the deed set aside without returning, or offering to return, to Berryman the consideration received from Berryman for the deed in question." There was no error in giving this instruction. It is now settled by our decisions that a deed of a person of unsound mind, made before office found, to one who has no knowledge of the grantor's incapacity is only voidable, and that, in order to avoid it, the consideration received must be tendered to the grantee: *Fay v. Burditt*, 81 Ind. 433; *Copenrath v. Kienby*, 83 Id. 18. The doctrine of our cases is well sustained by the decisions of other Courts: *Elston v. Jasper*, 45 Texas, 413; *Pearson v. Cox*, 71 Id. 246 (10 Am. St. R. 740); *Riggin v. Green*, 80 N. C. 236 (30 Am. R. 77); *Eaton v. Eaton*, 37 N. J. L. 108 (18 Am. R. 716); *Hovey v. Hobson*, 53 Maine, 451 (89 Am. Dec. 705); *Hovey v. Chase*, 52 Id. 304 (83 Am. Dec. 514); *Allis v. Billings*, 6 Met. 415 (39 Am. Dec. 744); *Gribben v. Maxwell*, 34 Kan. 8.

Mere weakness of mind, impairing only the capacity to transact business prudently and judiciously, is not sufficient to avoid a deed in a case where there is no fraud, and the trial Court did not err in so instructing the jury.

The Court gave the following instruction: "A judgment in a suit of Berryman against Boyer has been given in evidence, and if you find that the deed decreed by the Court in that case to be ratified and confirmed, is the same that is in controversy in this suit, then the Court instructs you to find for the defendant, Berryman." The appellant has no just cause to complain of this instruction. It was the duty of the Court to construe the record and judgment in the former action, and to instruct the jury as to its legal force and effect. The effect ascribed to the judgment by the Court is the correct one.

If there was any error in the judgment in the former action, the only mode in which it could be made available was by a direct attack. If a party seeks to avoid a judgment upon the ground that he was of unsound mind, he must assail the judgment directly, for it is not vulnerable upon a collateral attack.

It clearly appears upon the whole record that the judgment below is right. If any error at all was committed, it was in not directly instructing the jury to find for the defendant, Berryman.

Judgment affirmed.

Eaton v. Eaton, 37 N. J. L. 108 ; *Behrens v. McKenzie*, 23 Ia. 333 ; *Scanlon v. Cobb*, 85 Ill. 296 ; *Gribben v. Maxwell*, 34 Kan. 8 ; s. c. 7 Pac. R. 584.

CONTRA : *Gibson v. Soper*, 6 Gray, 279 ; *Hovey v. Hobson*, 53 Me. 453.

VOID.

THE POWER OF ATTORNEY of a person non compos mentis is void.

DEXTER v. HALL.

Supreme Court of the United States, 1872.

15 Wall. 9.

STRONG, J. The prominent question in this case is whether a power of attorney executed by a lunatic is void, or whether it is only voidable. The Circuit Court instructed the jury that a lunatic, or insane person, being of unsound mind, was incapable of executing a contract, deed, power of attorney, or other instrument requiring volition and understanding, and that a power of attorney executed by an insane person, or one of unsound mind, was absolutely void. To this instruction the defendant below excepted, and he has now assigned it for error.

Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem,

therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of Courts of law as well as Courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has a mind, but it is immature, insufficient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract, for want of mental capacity, he has no protection if his contract is only voidable.

It must be admitted, however, that there are decisions which have treated deeds and conveyances of idiots and lunatics as merely voidable, and not void. In *Beverly's Case*, 4 Reports, 123, b, which was a bill for relief against a bond made by Snow, a lunatic, it was resolved that every deed, feoffment, or grant which any man *non compos mentis* makes is avoidable, and yet shall not be avoided by himself, because it is a maxim of law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself and disable his own person. A second reason given for the rule was, "because when he recovers his memory he cannot

know what he did when he was *non compos mentis*." Neither of these reasons is now accepted, and the maxim no longer exists. There were other things ruled in Beverly's case, among which were these: that the disability of a lunatic is personal, extending only to the party himself, except that it extends to privies in tenure, as lord by escheat, and privies in estate, as tenant in tail; but that privies in blood, as heirs, or privies in representation, as executors or administrators, might show the disability of the ancestor, or testator, or intestate. It was also resolved that acts done in a Court of record were not avoidable even in equity. LORD COKE, in commenting on the case, remarked that "as to others there is a great difference between an estate made in person and by attorney; for if an idiot, or *non compos mentis*, makes a feoffment in fee in person, and dies, his heir within age, he shall not be in ward, or if he dies without heir the land shall not escheat; . . . but if the feoffment is made by letter of attorney, although the feoffor shall never avoid it, yet after his death, as to all others, in judgment of law, the estate is void, and therefore in such case, if his heir is within age, he shall be in ward; or if he dies without heir, the land shall escheat." Such also is the rule as stated in Fitz Herbert's *Natura Brevium*, 202, c. This is plainly a recognition of the principle that the letter of attorney of an idiot or lunatic is void, though he may not be permitted himself to assert its nullity. His heir and all others may. The doctrine is also asserted that as against the heirs of a lunatic his deed is invalid, and this, we think, has been steadily maintained in England.

In *Thompson v. Leach*, reported in *Carthew*, page 435, and in *Comberbach*, page 469, a clear distinction was taken between the feoffment of a lunatic taking effect by livery of seizin, and his deed of bargain and sale, his surrender, or grant. The former was held to be voidable only because of the solemnity of the livery, while the latter was held to be void. The case was ejectment brought by a lunatic's heirs, and the controlling question was whether his deed was only voidable, or whether it was absolutely void. The grantor had a life estate upon which were dependent contingent remainders, and he made a deed of surrender. If his deed was at any time effective be-

fore the contingency happened, it merged the tenancy for life, and destroyed the contingent remainders, and though the deed might afterwards be avoided by any means in law, yet the contingent remainders, being once extinct, could not be revived by any matter *ex post facto*. It was necessary, therefore, to determine whether the deed was a nullity or whether it was good until avoided. The Court resolved that the deed was void, *ab initio*, because of the grantor's lunacy. It was said that "there is a difference between a feoffment and livery made *propriis manibus* of an infant, and the bare execution of a deed by sealing and delivery thereof, as in cases of grants, surrenders, releases, &c., which have their strength only by executing them, and in which the formality of livery of seizin is not so much regarded in the law, and, therefore, the feoffment is not void, but voidable; but surrenders, grants, &c., of an idiot are void *ab initio*." The case is a leading one, and it is in some respects more fully reported in Salkeld, Vol. 3, page 300; see also 2 Ventris, 198. There it appears not only that the distinction mentioned is recognized, but that HOLT, C. J., declared the deed of a person *non compos mentis* to be void; that if he grants a rent, and the grantee distrains for arrears, he may bring trespass; that his letter of attorney, or his bond, is void, because, as he stated, the law had appointed no act to be done for avoiding them. *Thompson v. Leach* has never been disturbed, and, so far as we know, has never been doubted. It was followed by the case of *Yates v. Boen*, in Strange, Vol. 2, page 1104, which was an action of debt upon articles. The defendant pleaded "*non est factum*," and offered to give lunacy in evidence. Upon the authority of *Thompson v. Leach*, and *Smith v. Carr*, decided in 1728, the evidence was received.

The doctrine of *Thompson v. Leach* was asserted also in *Ball v. Mannin*, 1 Dow & Clark, 380, decided in the House of Lords in 1829. In that case the sole question presented was, by agreement of counsel, whether the deed of a person *non compos mentis* was *invalid at law*. In the inferior Court the Judge had charged the jury that "to constitute such unsoundness of mind as should avoid a deed *at law*, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life," and refused to charge that the unsoundness of

mind must amount to idiocy. The ruling was sustained by the Court of King's Bench in Ireland, and, on writ of error, by the Exchequer Chamber. The case was then removed to the House of Lords, and the judgment was affirmed. It is, therefore, the settled law of England, and it has been since the decision in *Thompson v. Leach*, that while the feoffment of an idiot, or lunatic, is only voidable, his deed, and especially his power of attorney, are wholly void. And now by Act of Parliament, 7th and 8th Vict., ch. 76, § 7, his conveyance by feoffment, or other assurance, is placed on the same footing with his release or grant.

Sir WILLIAM BLACKSTONE, it is true, appears to have overlooked the distinction made in *Thompson v. Leach*; and in his Commentaries, Book 2, page 291, while admitting that the law was otherwise prior to the reign of Henry VI., asserted the doctrine that the conveyances of idiots and persons of non-sane memory, as well as of infants and persons under duress, are voidable, but not actually void.. But Sir EDWARD SUGDEN, 1 Sugden on Powers, 179 (see also Shelford on Lunatics, 257-8-9), notices this statement with disapproval. His remarks are as follows: "When Beverly's case was decided it was holden that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice BLACKSTONE, following the old rule, has laid down that deeds of lunatics are voidable only, and not actually void. But in *Thompson v. Leach* the distinction was solemnly established that a feoffment with livery of seizin of a lunatic, because of the solemnity of the livery, was voidable only; but that a bargain and sale, or surrender, &c., was actually void. This, therefore, was the ground of the decision in *Yates v. Boen*. When the Chief Justice remembered that an innocent conveyance, or a deed, by a lunatic, was merely void, he instantly said that *non est factum* might be pleaded to it and the special matter be given in evidence."

In this country there has been inconsistency of decision. Some Courts have followed Mr. Justice BLACKSTONE and Beverly's case, without noticing the distinction made in *Leach v. Thompson*, *Yates v. Boen*, and other English cases. Such are

the decisions cited from New York, beginning with *Jackson v. Gumaer*, 2 Cowen, 552, and those relied upon made in other States. Nowhere, however, is it held that the power of attorney of a lunatic, or any deed of his which delegates authority, but conveys no interest, is not wholly void. And in Pennsylvania, in the *Estate of Sarah De Silver*, 5 Rawle, 111, it was directly ruled that a lunatic's deed of bargain and sale is absolutely null and void, and the distinction between his feoffment and his deed was recognized. So also in *Rogers v. Walker*, 6 Pennsylvania State, 371, which was an ejectment by a lunatic, it was held that a purchaser from her had no equity to be reimbursed his purchase-money or the cost of improvements, and Chief Justice GIBSON said: "Since the time of *Thompson v. Leach*, Carthew, 435, it has been held that a lunatic's conveyance executed by sealing and delivery only is absolutely void as to third parties, and why not void as to the grantor? It was said to be so for the very unphilosophical reason that the law does not allow him to stultify himself—an early absurdity of the common law, which was exploded with us by *Bensell v. Chancellor*:" 5 Wharton, 371.

The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. But, as already remarked, a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degree. With a lunatic it is wanting altogether. Yet it is universally held, as laid down by LORD MANSFIELD in *Zouch v. Parsons*, 3 Burrow, 1805, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. We are not aware that any different rule exists in England or in this country. It has repeatedly been determined that a power of attorney made by an infant is void: *Saunderson v. Marr*, 1 Henry Blackstone, 75; 2 Lilly, Abridgment, 69; 1 American Leading Cases, 248-9. So it has been decided in Ohio, *Lawrence v. McArter*, 10 Ohio, 37; in Kentucky, *Pyle v. Cravens*, 4 Littell, 17; in Massachusetts, *Whitney v. Dutch*, 14 Mass. 462; and in New York, *Fonda v. Van Horne*, 15 Wendell, 636. In fact,

we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.

It must therefore be concluded that the Circuit Court was not in error in instructing the jury that a power of attorney executed by an insane person, or one of unsound mind, is absolutely void.

This disposes of the only serious question in the case. There are other assignments of error, but they may be dismissed with brief notice. The only one which has any plausibility, and which needs particular notice, is that which complains of the refusal of the Court to permit a medical witness to give his opinion respecting the sanity of John Hall at the time when he signed the power of attorney, basing his opinion upon the facts and symptoms stated in the depositions read at the trial. The witness was, however, allowed to give his opinion upon the testimony adduced by the plaintiffs. The record does not show fully what were the facts stated in the depositions, nor whether they were established by uncontradicted evidence. It may be, therefore, that by the form in which the question was put the witness was required not merely to give his opinion upon facts, but to ascertain and determine what the facts were. This of course was inadmissible. The rule is, as laid down in Greenleaf's Evidence, § 440, "If the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case hypothetically stated:" *Sills v. Brown*, 9 Carrington & Payne, 601. The question asked was: "From the facts stated in these depositions, and the symptoms stated, what, in your opinion, was the state of John Hall's mind on December 27, 1852, as to sanity or insanity?" It was to this the plaintiffs objected. But the witness gave his opinion, founded on all the testimony adduced by the plaintiffs tending to show insanity, and that opinion was that Hall was capable of doing business and of executing a power of attorney. He could have said no more had he been allowed to consider the evidence given by the defendants as well as that given by the plaintiffs. The defendants, therefore, received no possible

injury from the ruling of the Court. Hence this assignment cannot be sustained.

There remains one other exception to be considered, for the proper understanding of which reference must be made to the plaintiff's title.

That the grants and confirmations relied on by the plaintiffs were effectual to vest in Hall the title to the land in dispute admits of no question, and it is not denied by the plaintiff in error. He claimed under Hall. But when this title had been given in evidence by the plaintiffs below, with proof that they were the children and heirs of Hall, and when they had rested in chief, the defendants asked the Court to direct a verdict in their favor for the reason, among others, that under the State statute of March 5, 1864, it was incumbent upon the plaintiffs, inasmuch as their action had not been commenced within a year after its passage, to show an actual possession in themselves or their ancestors within five years next before the commencement of the action, which they had failed to do. The Court refused the direction, and correctly. At the time when the request was made it did not appear that the actual possession of the land had not been enjoyed by the plaintiffs within five years next before the action was brought, and, therefore, they were presumed to have had such possession, in the absence of evidence of an adverse possession, and no such evidence has been given. The 9th section of the Act of April 22, 1850, which defined the time for commencing civil actions, expressly declares that in every action for the recovery of real property such a presumption shall be made in favor of one establishing a legal title. In addition to this, three of the plaintiffs were minors when the title descended to them, and continued minors until within less than five years before the suit was brought, and one was a minor until 1872. The period of their disability was, therefore, not to be included in the statutory period of limitation.

It is probable that when the request to direct a verdict for the defendants was made, the supplementary Act of April 4, 1864, was overlooked. Certainly it has not been argued here that the plaintiffs below were affected by the Act of March 5 of that year. But it is claimed the plaintiffs were barred by

the Statute of Limitations of 1855. That, however, is not before us. The Circuit Court was asked to give no instruction in regard to it, and none was given. Besides, so far as the record exhibits, there was no evidence of continued adverse possession during the five years next preceding the commencement of the suit.

There is nothing more in the case that requires particular notice ; nothing which would justify our awarding a new trial. Judgment affirmed.

So the *deed* of an insane person *under guardianship* is void: *Wait v. Maxwell*, 5 Pick. 217 ; *Griswold v. Butler*, 3 Conn. 231.

In some States, as New York, Pennsylvania, and Oregon, the deed of an insane person has been held absolutely void under any circumstances : *Van Deusen v. Sweet*, 51 N. Y. 384 ; *In re De Silver*, 5 Rawle, 111 ; *Farley v. Parker*, 6 Ore. 105.

THE CONTRACT OF MARRIAGE made by a person non compos mentis is void.

INHABITANTS OF MIDDLEBOROUGH v. INHABITANTS OF ROCHESTER.

Supreme Court of Massachusetts, 1815.

12 Mass. 364.

PARKER, C. J. The verdict having established the fact that Ebenezer Winslow, to whom the pauper was formerly married, was, at the time of the solemnization, void of understanding, so as to be incapable of making a valid contract, judgment must be entered for the defendants, unless a marriage, solemnized under such circumstances, will change the settlement of a female pauper from the place of her nativity to the place of her supposed husband's settlement. No authority has been cited to show that such a marriage is valid to any intent or purpose whatever. On the contrary, it is laid down by BLACKSTONE, 1 Black. Comm. 438, that, like all other contracts, if made with a fool, or person *non compos* at the time of it, it is absolutely void. And it is but reasonable that these unhappy persons, who are prohibited by law from making any binding contract

for the merest pecuniary trifle, should be protected from the effects of a covenant of so high a nature, which never could be entered into by the other party without some base or sinister design. If it would be hard that the issue of such marriages should be deemed bastards, it would be as much so, that human beings, without reason, or their families, should be the victims of the artifice of desperate persons who might be willing to speculate on their misfortunes: Poynter, Marriage and Divorce, 147; Browning *v.* Reame, 2 Phil. 69; Turner *v.* Meyers, 1 Hag. 440.

Judgment according to the verdict.

Schouler on Domestic Rel., sec. 18.

(b) **IDIOTS:** The contracts of idiots rest upon the same principles as those of lunatics or insane persons.

BURNHAM *v.* KIDWELL.

Supreme Court of Illinois, 1885.

113 Ill. 425.

SCHOFIELD, C. J. The question whether a deed made by an idiot or lunatic, before the fact has been found by a jury and a conservator appointed, is void or only voidable, can hardly be regarded as open to argument in this State. The first section of our statute in relation to idiots, lunatics, etc., provides for the impanelling of a jury to find whether a person is an idiot or lunatic, and requires the Court to appoint a conservator, when he shall be so found. The 14th section of the same statute declares that "every note, bill, bond, or other contract, by an idiot, lunatic, etc., . . . made after the finding of the jury, as provided in section 1 of this Act, shall be void as against the idiot, lunatic, etc., . . . and his estate." But by the next section (section 15) it is provided: "Every contract made with the idiot, lunatic, etc., . . . before such finding, . . . may be avoided, except in favor of the person fraudulently making the same:" Rev. Stat. 1874, chapter 86. Since a deed is but one form of a contract, it is necessarily

included in the word "contract," as here used: 1 Chitty on Contracts (11th Am. ed.), 4; Bishop on Contracts, sec. 14.

Counsel for appellee, however, quote from section 1, chapter 80, of the Revised Statutes of 1874, to the effect that every deed, etc., not procured by duress, but signed, sealed, etc., the maker being of full age, sound mind, and discreet, shall be sufficient, etc., and insist that this, by implication, declares that one not of sound mind can not convey. This section simply declares that certain things shall constitute a good deed. It does not negative that a good deed can in no otherwise be made. It places idiots, lunatics, and minors in the same class—that is, excludes each—and yet nothing is better settled by the adjudications of this Court than that the deeds of infants are not void, but voidable only: *Keil v. Healey*, 84 Ill. 104; *Cole v. Pennoyer*, 14 Id. 158; and *Blankenship v. Stout*, 25 Id. 132; and, necessarily, the implication contended for is not warranted. Moreover, in *Scaulan v. Cobb*, 85 Ill. 296, we expressly held that such a deed is voidable. Numerous decisions of other Courts, not referred to in the opinion in that case, might be referred to in support of the doctrine, but it can not be necessary. The statute itself so declares, and that is conclusive.

Mrs. Carson and the appellants appear to have been purchasers in good faith and without notice, and it is quite clear that the original loan, to the extent it was made an incumbrance on the idiot's land, was made for the benefit of the idiot, and that it was, in good faith, expended about his care and support.

Although we have spoken of this party as an idiot, it is proper to be observed he is not entirely without mind, nor is he universally esteemed an idiot. Some testimony is adduced that he is not an idiot at all, and all that can be fairly deduced from the testimony, when all considered together, is, that he is weak-minded to a degree rendering him incompetent to successfully conduct business.

No offer has been made, either before or since bringing suit, to reimburse to the parties the money of which the idiot has thus had the benefit. He can not retain this money and still recover back the land: *Scanlan v. Cobb*, *supra*; *Eaton v.*

Eaton, 37 N. J. L. (8 Vr.) 108; Lincoln v. Buckmaster, 33 Vt. 659; Carr v. Halliday, 5 Ired. Eq. 67.

The judgment is reversed, and the cause remanded.

Judgment reversed.

(c) MENTAL WEAKNESS AMOUNTING TO INCAPACITY:
The same rules of law which apply to lunatics and idiots apply also to persons afflicted with mental weakness.

HENDERSON v. MCGREGOR.

Supreme Court of Wisconsin, 1872.

30 Wis. 78.

DIXON, C. J. Joseph Henderson, the plaintiff, who sues by his legally appointed guardian, Andrew Henderson, whilst in some particulars a person of extraordinary memory and possibly of sound judgment, is undoubtedly a person of very weak will and easily bent to the purposes of others, especially those who have acquired his confidence and regard. In some respects he seems to have the strength and ability of a man of sound sense, whilst in others he has all the weakness and puerility of a mere child. He may, perhaps, understand and appreciate the value of property, but it can hardly be said that he knows how to acquire it. His great weakness appears to be an almost total lack of determination or will, and of power to resist the commands or entreaties of others who have acquired an influence over him; and the question of fact in the case seems to be whether this is such as to amount to imbecility or to render him *non compos mentis* in transactions of the kind set out in the pleadings, so that a Court of equity will interfere to rescind them if they appear, in any manner inequitable or unfair towards him. Mere weakness of understanding or the liability to be sometimes deceived and duped will not in general suffice for this purpose, but it must be such as to render the party in a legal sense *non compos*. It is the opinion of this Court that the evidence is such as to sustain the conclusions of fact arrived

at by the Court below, and as to the principles of law involved they were so fully discussed in a recent case before this Court, that it is unnecessary to do more than to refer to that opinion: *Encking v. Simmons*, 28 Wis.

By THE COURT. Judgment affirmed.

(d) **WEAKNESS INCIDENT TO OLD AGE:** The mental weakness incident to old age does not necessarily incapacitate one from contracting.

STONE v. WILBERN.

Supreme Court of Illinois, 1876.

83 Ill. 105.

CRAIG, J. It appears, from the evidence contained in the record, that Mary A. Stone originally owned the premises in controversy, consisting of a farm in Cook County, which, on the 26th day of January, 1865, she conveyed by deed to one Beverly, who, on the same day, conveyed the same to Richard Stone, the husband of said Mary A. Stone. On the 18th day of April, 1865, Mary A. Stone died intestate, and the original bill in this cause was filed by Isabella Wilbern, daughter of Mary A. and Richard Stone, and her husband, Amos W. Wilbern, to set aside and cancel the two deeds executed on the 26th day of January, 1865, and for partition of the premises. On the 8th day of February, 1871, Richard Stone conveyed the premises by deed to his son, Robert R. Stone, and to his son-in-law Amos W. Wilbern.

To the original bill Richard Stone filed a cross-bill, for the purpose of avoiding the last-named deed, on the alleged ground of fraud and deceit, and undue influence practised upon him by the said Robert R. Stone and Amos W. Wilbern.

Upon the hearing, the Court rendered a decree dismissing both the original and cross-bills, to reverse which this writ of error was brought by Jane Stone, the wife of Richard Stone by a second marriage, who is the sole devisee and executrix of the last will and testament of the said Richard.

No proof was introduced on the hearing for the purpose of sustaining the allegations of the original bill—that branch of the case it will not, therefore, be necessary to consider. The only question then presented by the record is, whether the deed of February 8, 1871, executed by Richard Stone to Robert Stone and Amos W. Wilbern, was procured by fraud and deceit, or undue influence of the grantees, practised upon the grantor, and this must be determined by the evidence bearing upon the point.

What is the evidence relied upon to defeat the deed? One witness says Richard Stone "was a weak old man." It was also proven that he had trouble with his wife and her two children by a former marriage; that his son Robert visited him a short time before the deed was executed, and, after that interview, the grantor left his wife and went to live with Wilbern; that Wilbern's wife told him he had no right to the farm in question, Beverly's deed to him being good for nothing; that while he was residing with Wilbern he went to the office of a notary public; the deed was prepared and executed.

These are the leading facts relied upon to impeach the deed. Suppose Richard Stone was "a weak old man," that fact did not incapacitate him from conveying his property. So long as he had the mental capacity to transact ordinary business, and the record nowhere shows that this was wanting, he had the power and ability to dispose of his property in such a manner as his judgment might dictate.

At the time the deed was executed Richard Stone was about seventy years old, and it is no doubt true he was somewhat enfeebled in body, and his mind was not, perhaps, as vigorous as in former years, but that he was capable of transacting ordinary business, and knew and fully comprehended the nature and character of the transaction is clear, even from his own evidence. At the time the deed was executed, he says: "They told me the second paper was a warranty deed; don't know who was present; the last was explained in the presence of Wilbern and some one who signed it as a witness; suppose I knew, before signing, what the deed was; they told me it was to Capt. Amos W. Wilbern and Robert Stone; expect it was of the premises in controversy." Again he says: "Made the

deed to Wilbern and Robert with the understanding that they would take care of the property for me."

From the evidence of the grantor himself, it is apparent that he not only knew and fully comprehended the nature of the transaction, but his evidence repels the theory that fraud or undue influence was practised upon him.

Owing to difficulty with his wife and her children, he had abandoned them, and concluded to make his home with his daughter. Under such circumstances, it was not unreasonable that he should place his property in the hands of his children, relying upon them for support.

But if there was any doubt in regard to the matter, from the evidence of the grantor, the testimony taken to sustain the deed would seem to leave no room for controversy.

Hagen Webster, who attested the execution of the deed as a subscribing witness, says: "Signed the deed at Elgin in the office of Joslyn & Wing; Stone, Wilbern, and others present. Stone said he could not write; I said to him, it is a warranty deed, and a transfer of all the land mentioned in the deed; then signed his name by taking hold of the pen; don't remember that the deed was read to him; told him it was a deed; he said he understood it was."

Wilbern, one of the grantees in the deed, in his evidence, says: "Stone says he was afraid the property would all be used up and squandered, and it was the hard earnings of himself and his first wife; wanted it for his children by his first wife. He was to have control of it. If he wanted to go back on the farm, he was to have a lease, and when he was done with the farm, the children were to have it. He was to receive the use of the farm during life. He made the deed voluntarily; no one induced him to make it. He has made no request to have a reconveyance."

The other grantee in the deed was not present when it was executed, nor does it appear that he was aware of the fact that the deed was about to be made. While he may have advised his father to make the deed, we can not understand upon what principle it can be claimed that the conveyance can be attributed to any undue influence or fraud upon his part. But conceding it to be true that the grantees in the deed, and Isabella

Wilbern, each and all of them, advised and encouraged the grantor, Richard Stone, to execute the deed, such would not impair the validity of the instrument, unless the free agency of the grantor was destroyed: *Roe et al. v. Taylor*, 45 Ill. 485.

So long as the grantor had the mental capacity to convey, and the deed was his own act, and not that of others, it can not be set aside.

From these views it follows that the decree of the Circuit Court dismissing the cross-bills was correct, and it will be affirmed.

Decree affirmed.

(e) **PERSONS DEAF AND DUMB:** Persons deaf and dumb, even from birth, are not necessarily incapable of contracting, though the presumption is against their capacity.

BROWER v. FISHER.

Court of Chancery, 1820.

4 John. Ch. 440.

THE CHANCELLOR. The sole question in this case is, whether the bill shall be dismissed with or without costs. The plaintiff claims no relief after the inquisition which has been returned.

Upon the finding of the jury under the commission, in nature of a writ *de lunatico inquirendo*, I refused to appoint a committee, and adjudged that the defendant was not to be deemed an idiot from the mere circumstance of being born deaf and dumb. This is a clear settled rule, and numerous instances have occurred in which such afflicted persons have demonstrably shown that they were intelligent, and capable of intellectual and moral cultivation.

In Elliot's case (Carter's Rep. 53), BRIDGMAN, Ch. J., and the other Judges of the C. B., admitted a woman born deaf and dumb, to levy a fine, after due examination of her. He mentioned also the case of one Hill, who was born deaf and dumb,

and who was examined by Judge WARBURTON, and found intelligent, and admitted to levy a fine. So LORD HARDWICKE, in *Dickinson v. Blisset*, Dick. Rep. 268, admitted a person born deaf and dumb, upon being examined by him after she came of age, to take possession of her real estate.

Notwithstanding these authorities, the bill does not appear to have been filed vexatiously, but rather to obtain, for greater caution, the opinion of the Court on a point which had been left quite doubtful in many of the books, and which had never received any discussion here. It is stated, in Bracton (*De Exceptionibus*, lib. 5. ch. 20.) to be a good exception taken by the tenant: *Si persona petentis fuerit surdus et mutus naturaliter, hoc est, nativitate*; for it is said, *acquirere non potest, et per officium judicis inveniendæ sunt ei necessaria quoad vixerit*; and he takes it for granted that such a person is placed under a *curator*, and that he must sue in assise, *sicut minor*. So it is said, in Brooke (*Eschete*, pl. 4.), that *videtur qui surdus et mutus ne poet faire alienation*; and the distinction taken was (Dy. 56. a. note 13.) that if deaf and dumb from his birth he was *non compos*, but not if so by casualty. (a) By the civil law, it was also generally understood and laid down, that a person born deaf and dumb was incapable of making a will, and he was deemed a fit subject for a curator or guardian: Inst. 1. 23, 24. and Ferniere, h. t. and Inst. 2. 12. 3. and Ferrier and Vinnius, h. t. Perhaps, after all, the presumption in the first instance is, that every such person is incompetent. It is a reasonable presumption, in order to insure protection and prevent fraud, and is founded on the notorious fact, that the want of hearing and speech exceedingly cramps the powers and limits the range of the mind. The failure of the organs requisite for gen-

(a) The author of *Fleta* (lib. 6. c. 40.) supposes a person deaf or dumb, to be incapable of enfeoffing, &c.; "*Competit etiam exceptio tenenti propter defectum naturæ petentis, vel si naturaliter a nativitate surdus fuerit aut mutus, tales enim acquirere non poterunt, nec alienare, quia non consentire, quod non est de tarde mutis vel surdis, quibus dandi sunt curatores et tutores, &c.*" But Coke (Co. Litt. 42. b.) says, a man deafe, dumb, or blind, so that he hath understanding and sound memory; albeit he expresse his intention by signs, may infeoffe," &c., though a man deaf, dumb, and blind, from his nativity, cannot.

eral intercourse and communion with mankind oppresses the understanding; *affigat humo divinæ particulam auræ*. A special examination, to repel the inference of mental imbecility, seems always to have been required; and this presumption was all that was intended by the civil law, according to the construction of the Ecclesiastical Courts; for a person born deaf and dumb was allowed to make a will, if it appeared upon sufficient proof that he had the requisite understanding and desire: Swinb. part 2. s. 10.

I am satisfied that the plaintiff is justly to be exempted from the charge of a groundless and vexatious inquiry, and the course is not to punish the prosecutor of a charge of lunacy with costs, if the prosecution has been conducted in good faith, and upon probable grounds: 1 Collinson on Lunacy, 461, 464. I shall, therefore, dismiss the bill without costs.

Decree accordingly.

III.

DRUNKARDS.

The contracts of a person executed when he is so intoxicated that he does not understand the nature and effects of his actions, are either *valid*, *voidable*, or *void*.

VALID.

It has been said in one case, and upon principle it is true, that a person thus intoxicated may bind himself for necessities.

GORE v. GIBSON.

Courts of Exchequer, 1845.

13 M. & W. 623.

POLLOCK, C. B. I am of opinion that the defendant is entitled to our judgment. The authorities on this subject are col-

lected in Kent's Commentaries, Vol. 2, page 451, where the author observes that although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice. With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case the defendant is still liable for the consideration of his endorsement, although the endorsement itself can give the plaintiff no title.

PARKE, B. With respect to the authorities cited for the plaintiff, in which Courts of equity have refused to relieve parties against contracts made by them when in a state of intoxication, those authorities may possibly have reference to a case of *partial* drunkenness. But where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified

the old doctrine that a man shall not be allowed to allege his own lunacy or intoxication; and *total* drunkenness is now held to be a defence: *Yates v. Boen*, 2 Stra. 1104; *Cole v. Robins*, Bull. N. P. 172; *Cooke v. Clayworth*. The averment in this plea that the defendant *endorsed* the bill means merely that he wrote his name upon it; then the plea goes on to state, as matter of avoidance, that the act of so writing his name is not obligatory on him, because he was in fact *non compos mentis* when he did it. The plaintiff contends that this defence might be given in evidence under a plea denying the endorsement; but that is not so, because we have already held that endorsement means, in the first instance, the mere act of writing the name upon the bill.

ALDERSON, B. A party, even in a state of complete drunkenness, may be liable in cases where the contract is necessary for his preservation—as in the case of a supply of actual necessities; so, also, where he keeps the goods when he is sober. The ground of his liability there is that an implied contract to pay for the goods arises from his conduct when he is sober; although I doubt much whether, if he repudiated the contract when sober, any action could be maintained upon it. Here the action is necessarily brought upon the contract itself; and when it is shown that the contract by endorsement was made when the defendant was in such a state of drunkenness that he did not know what he was doing, and especially when it appears that the plaintiff knew it, I cannot doubt that the contract is void altogether. It is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism.

Leave to the plaintiff to amend, on payment of costs, by withdrawing the demurrer and taking issue, otherwise
Judgment for the defendant.

SMITH ON CONTRACTS, 365, note.
1 Wharton on Contracts, sec. 121, note.

VOIDABLE.

Such contracts, other than for necessities, are voidable, not void, if the drunkard is not under guardianship at the time he makes them.

CARPENTER *v.* ROGERS.

Supreme Court of Michigan, 1886.

61 Mich. 384.

SHERWOOD, J. The parties in this case, on the second day of January, 1885, traded horses.

The plaintiff gave his team, and an order on Mr. Tuttle, of Niles, for five dollars, for the team of defendant.

The team obtained by the plaintiff proved to be of little value, unsound, and, as plaintiff claimed, not as represented; and that the defendant cheated and defrauded him out of his property by taking advantage of his inability, when he was drunk, in making the trade; and, claiming a rescission of the contract under which the trade was made, he brought replevin to obtain the team he let the defendant have on the exchange.

The property was taken upon the writ, and delivered by the sheriff to the plaintiff.

The cause was tried in the Berrien Circuit, before a jury, and the plaintiff prevailed.

On the trial testimony was given tending to show that the plaintiff was a young man of weak and feeble mind, scarcely able to do any business requiring the exercise of ordinary judgment; and that he was intoxicated to the extent when he made the trade that he did not know what he was doing, or, at least, have intelligent comprehension of the transaction; that the defendant was a horse-trader unknown to the plaintiff, and that the trade was brought about by one Allen, a neighbor of the plaintiff and a friend of the defendant; that it was through

Allen the intoxication of the plaintiff was procured; that the team of plaintiff was a pair of young horses, and worth from \$150 to \$200; and that the defendant's team was not worth over \$75.

On the part of the defendant these facts, or most of them, were controverted, and counsel for defendant denied there had ever been any rescission of the contract.

The Court, in charging the jury, said upon the subject of rescission, and the condition of the plaintiff at the time the trade was made:—

“If he was so drunk that he did not know what he was about, the contract would be void, and so no rescission of the contract would be needed. He could replevy his property without any rescission, because there would be no contract to rescind.”

This was error.

A contract entered into by a person who is so drunk as not to know what he is doing is voidable only, and not void, and may therefore be ratified by him when he becomes sober: Story on Sales, § 15; Benj. on Sales, 43; Bish. on Cont. § 304; *Matthews v. Baxter*, L. R. 8 Exch. 132; *Caulkins v. Fry*, 35 Conn. 170; *Foss v. Hildreth*, 10 Allen, 76–9; *VanWyck v. Brasher*, 81 N. Y. 260; *Warnock v. Campbell*, 25 N. J. Eq. 485; *French v. French*, 8 Ohio, 214; *Noel v. Karper*, 53 Penn. St. 97; *Dulany v. Green*, 4 Har. (Del.) 285; *Cummings v. Henry*, 10 Ind. 109; *Cory v. Cory*, 1 Ves. Sr. 19; *Pitt v. Smith*, 3 Camp. 33; *Newell v. Fisher*, 11 Smedes & M. 431; *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Menkins v. Lightner*, 18 Ill. 282; *Taylor v. Patrick*, 1 Bibb, 168; *Broadwater v. Darne*, 10 Mo. 277; *Hutchinson v. Brown*, 1 Clarke, Ch. 408; Story, Cont. 27, 28; Chit. Cont. 153, 154.

Without passing upon the facts whether or not the plaintiff's testimony showed a rescission, or what the jury would have been warranted in finding upon that subject under a proper charge by the Court, we can only say, upon the record as presented, it was necessary for the plaintiff to show a rescission of some kind before he could maintain his suit, and the Court should have so charged the jury.

We find no other error in the case: The judgment must be reversed, and a new trial granted
The other Justices concurred.

Cases cited in above opinion.

Bush v. Breinig, 113 Pa. St. 310. But see *Reinskopf v. Rogge*, 37 Ind. 207.

RATIFIED.

Such contract may be ratified by the intoxicated party, when sober, by retaining the consideration, and in many other ways.

WILLIAMS *v.* INABNET.

Court of Appeals, S. C. 1829.

1 Bailey, 323.

COLCOCK, J. I will not say that the verdict of the jury ought to have confirmed the contract, but it is clear from the report of the presiding Judge that there was evidence enough to have authorized such a finding. It is perhaps one of the most difficult questions which can be presented to a jury, to decide how far the capacity to contract has been destroyed by the too free use of ardent spirits. But too ready an ear should not be lent to such a defence; and in all cases where the subsequent conduct of the party making it is such as to have the appearance of his having confirmed the contract, the defence should not be allowed; for even if a man be so much intoxicated as not to know what he is doing, yet he may afterwards confirm the contract by his acts. If he does not intend to be bound by it, he should go the instant he is restored to his senses and return all that he received as a consideration.

Now here the plaintiff's own note was returned, but not the other note, nor the cash, as far as we know from the report of the presiding Judge; and his reports are usually so accurate, so clear, and so full as greatly to aid us in the discharge of our duty. It is said, however, on the other side that they were

returned. But we must be governed by the report of the presiding Judge, and if the papers and money were not returned, the question should have been submitted whether, supposing the defendant to have been so drunk as not to know what he was doing at the time of the contract, he did not afterwards confirm it.

Motion granted.

Mathews v. Baxter, L. R. 8 Ex. 132 ; *Reinskopf v. Rogge*, 37 Ind. 207.

AVOIDED.

To avoid such contract the party must *return the consideration*, or offer to, before he can prevail.

JOEST v. WILLIAMS.

Supreme Court of Indiana, 1873.

42 Ind. 565.

DOWNER, J. The appellant filed a claim against the estate of the appellee's decedent, consisting of a promissory note executed by the deceased to one Hutson, and by him indorsed to the appellant. The note was dated the 9th day of December, 1870, and was payable twenty-seven months after date, and was for two hundred and ten dollars.

The administrator set up as defences to the note: 1. That the note was obtained by fraud and without any consideration; 2. That the same was obtained by fraud in this, that said note was executed by the deceased when he was so intoxicated as to be wholly ignorant of making or signing the same; 3. That there was no consideration; 4. That the deceased never executed the said promissory note.

The plaintiff replied to the whole answer by a general denial, and for a second paragraph of his reply, confined to the second paragraph of the answer, he alleged that the consideration of the note was the purchase of certain real estate sold by the said Hutson, the payee, to the deceased, and that the de-

ceased kept and retained said real estate until the time of his death, and that the same had been sold by the administrators of the estate of said deceased as part of the property of his estate.

Upon a trial of the issues by the Court there was a finding for the defendant, a motion made by the plaintiff for a new trial overruled, and judgment on the finding.

The error assigned in this Court is the overruling of the motion for a new trial.

The reason for a new trial, as stated in the written motion, was that the evidence was not sufficient to justify the finding of the Court.

We think it essential to the proper understanding of what is decided by the Court, that we shall set out the evidence in this opinion.

David Robinson testified as follows: "I recognize the note in controversy. I wrote the name of deceased to said note, at his request, and he made his mark thereto in my presence. I read the note to him before he signed it. He was pretty drunk. He could write his own name, and did generally write his own name. I did not write my name upon the note as an attesting witness until nearly eighteen months after it was executed."

Downey was killed in two or three days after the note was executed. The note was then read in evidence, and the bill of exceptions informs us that, it appearing that the note had not become due at the time of trial, it was agreed between counsel that no objection should be raised on that account, but that if the claim should be allowed it should be paid at maturity.

Richard H. Hutson testified as follows: "I am the payee of the note. It was executed in my presence. I sold a house and lot in Wadesville to the decedent, and in consideration therefor the decedent, Downey, gave me two notes, and this note in question for the interest thereon. This note was a part of the consideration for the sale of said house and lot. I executed to him a deed for the house and lot, and he kept it in his possession until he died. I transferred the note to the plaintiff. Downey was pretty drunk when he signed the note, too drunk to write his own name. The execution of the note by him was in pursuance of the contract previously made between us.

The next morning after he signed the note I met him in Wadesville and asked him how he liked his trade. He said he was perfectly satisfied with the trade, and intended to marry in a few days and move into the house. At this time he was not much drunk. In two days afterwards he was killed. He did not in his last conversation mention the note particularly, but the note was given by him to carry out the agreement first made between us. The decedent could write his name." This was all the plaintiff's evidence.

Benjamin Gwaltney, on behalf of the defendant, testified as follows: "I knew the decedent well. I have seen him write often, but never saw him make his mark. I know nothing else about this matter, except what Mr. Cross told me." This was all the evidence given in the case.

The defence that the note was given without consideration is not sustained by the evidence. On the contrary, it seems to have been given for a valuable and sufficient consideration. Counsel for the appellee call attention to that part of the testimony showing that the note in question was given for the interest on the other two notes, and suppose that Hutson had received full value for the house and lot in the other two notes, and when the deceased was intoxicated got him to give this note to obtain additional pay when none was due. It does not appear that this note was given at a different time from that at which the other two notes were given. Nor does it appear that it was not. It was given, however, for interest on the other two notes. It is probable, or possible, to say the least, that the other two notes were given for the principal of the purchase-money of the real estate, and that the note in question was given at the same time for the interest which was to accrue. But if this note was given after the giving of the other two for the interest that had already accrued, it would not, in either case, be without consideration.

We think there can be no question that the deceased executed the note. There is no conflict in the evidence as to this. That the deceased could write, but on this occasion chose to make his mark and not write his name, is a circumstance which cannot control the positive uncontradicted evidence that

the signature was written to the note at his request, and that he made his mark thereto in the presence of the witnesses.

Upon the question as to the other ground of defence there is more room for doubt; that is, whether or not the maker of the note was so much intoxicated as to be incapable of binding himself by the contract. But see *Reinskopf v. Rogge*, 37 Ind. 207. It may be said in this connection that that part of the reply to the second paragraph of the answer which alleges that the real estate for which the note was given had been sold by the administrator of the deceased, was wholly unsupported by the evidence. The circumstance that on the next day after the note was given, when he was "not much drunk," he expressed himself perfectly satisfied with the trade, cannot have much weight in the case. Counsel for the appellee argue the case, in part, as if there was an answer in showing that the note had been obtained by fraud. But this is a misapprehension. While it is said in one or two of the paragraphs that the note was obtained by fraud and without consideration, we cannot regard that part of these paragraphs which speaks of fraud as amounting to any defence at all. Fraud cannot be pleaded in this general way, but the facts constituting the same must be set out particularly. It is not enough to say that a transaction was fraudulent, or that an instrument was obtained by fraud, but the facts must be alleged: *Curry v. Keyser*, 30 Ind. 214.

Conceding that the evidence shows that the deceased, when he executed the note, was too much intoxicated to bind himself by the contract, which, however, may well be doubted, there is a ground on which even that defence must be held to be insufficient, and that is that the contract was not, on account of the intoxication of Downey, rendered absolutely void, but was only voidable, and that to avoid it he or his representative must have restored what was received by him under the contract, before he could be relieved from its obligation. In *McGuire v. Callahan*, 19 Ind. 128, it was said by this Court: "The plaintiff seeks to avoid the instrument on the ground of fraud and drunkenness. He cannot, however, treat the instrument as void, and at the same time as good. If the instrument is good, the plaintiff can maintain no action to recover the value of the property thus sold, if the defendant has performed the stipula-

tions to be by him performed, which, for aught that appears, he has done. If the instrument is voidable, either on the ground of fraud or drunkenness, the plaintiff, before he can avoid it and maintain an action for the value of the property thus transferred, must place the defendant *in statu quo* by refunding to him what he has advanced in pursuance of the contract. . . . This doctrine, in our opinion, is as applicable to contracts voidable on the ground of drunkenness, as those voidable on the ground of fraud. Drunkenness does not make a contract void, but only voidable: 1 Story Con., sec. 45, and authorities in note 4, p. 86."

We adhere to this authority as a correct exposition of the law on the subject, and hold that the note which is in controversy in this case is not, on account of the intoxication of the maker at the time of its execution, absolutely void, but only voidable. It follows, according to a well-settled rule of law, that to enable the maker or his representative to defend successfully on that ground, there must have been a rescission of the contract by placing the parties *in statu quo*. As it appears that the maker of the note, as alleged in the second paragraph of the reply, received a deed of conveyance for the real estate for which, in part, the note was given, and it is not alleged or shown by the evidence that he or his representatives ever reconveyed the title, or in any way properly rescinded the contract, the Court should have found for the plaintiff upon the evidence, instead of finding for the defendant.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

The avoidance must be made within a reasonable time after becoming sober: *Cummins v. Henry*, 10 Ind. 109.

VOID.

Such contracts, whether for necessities or not, if express and executed by the drunkard while under guardianship, are void, and hence cannot be ratified.

WADSWORTH v. SHARPSTEEN.

Court of Appeals of New York, 1853.

8 N. Y. 388.

RUGGLES, C. J. When a man has been found by inquisition duly taken in pursuance of the statute to be incapable of conducting his own affairs in consequence of habitual drunkenness, his property, real and personal, is taken out of his hands, and put into the custody and control of a committee. The object of this proceeding, as declared in the statute (2 R. S. 52), is to prevent the property being wasted and destroyed; and to provide for the maintenance of himself and his family and the education of his children. The committee is required to file an inventory of the property and to give security for the performance of the trust. This trust continues without interruption until the death of the drunkard or the superseding of the commission. The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals; and therefore, during such intervals the drunkard has no more authority to deal with or dispose of the property, than while he is in a stage of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication; and the committee could not execute his trust with safety to himself or benefit to the drunkard or his family. Similar consequences would unavoidably follow from permitting the drunkard during sober intervals to contract debts or incur liabilities, by which the property might be seized and sold on judgment and execution. The effect of the inquisition

is that the drunkard is incapable at all times of conducting his affairs; and they are therefore taken wholly out of his control. From the very nature and object of the proceeding, therefore, the inquisition must be regarded as conclusive evidence of the incapacity of the drunkard to dispose of his property or to contract debts from the time when it is found. This was so decided in *L'Amoureux v. Crosby*, 2 Paige, 427. And in *Leonard v. Leonard*, 14 Pick. 283, a decree of the probate Court declaring a person *non compos mentis* and putting him under guardianship was held to be conclusive evidence of the disability of the ward against a person dealing with him during his wardship.

It is contended, however, that the inquisition ought not to be conclusive against the plaintiff, a *bona fide* holder of the bill on which the action was brought, and who had no notice of the proceeding when he took the defendant's agreement to waive the protest of the draft.

The general rule undoubtedly is, that a decree or other judicial proceeding binds those only who are parties to it. But there are exceptions to this rule. Proceedings *in rem* are conclusive on all the world: 1 Starkie's Ev. 246, 7; Phil. Ed. 1837. And inquisitions being made under competent public authority to ascertain matters of public interest and concern, are said to be analogous to proceedings *in rem*, to which no one can strictly be said to be a stranger. They are clearly admissible in evidence. Inquisitions of this nature are public and notorious, and presumed to be known to those who subsequently deal with the subjects of them. And as to all business which the committee is authorized to transact for the drunkard, strangers must deal with the committee and not with the drunkard, until the inquisition is set aside. There can be no doubt of the authority of the Court to order an issue at the instance of a creditor for the purpose of retrying the facts found by the inquisition, and of setting it aside: 5 Paige, 242, In the matter of Christie; 11 Paige, 243, In the matter of Giles. The creditor is therefore not without remedy against an inquisition improperly found. And if the creditor should happen to suffer from making a contract with a drunkard without knowledge of the inquisition, and should thereby sustain a loss, the hard-

ship is no greater than if he dealt with a minor believing him to be of full age. It is his duty to ascertain whether those he deals with have the capacity to contract.

There are many dicta in the books to the effect that inquisitions of lunacy are admissible, but not conclusive evidence. But in all the cases where these dicta are found the question arose upon contracts or conveyances made before the finding of the inquisition. It has been adjudged, however, that the inquisition is not conclusive evidence of the lunatic's incapacity to make a will. This is an exception to the general rule, and the reason given for it in the case of *Leonard v. Leonard*, 14 Pick. 284, is, that this is an act which the guardian can not do for him. And in another case, that the making of a will is an act manifestly distinguishable from contracts and other acts done *inter vivos* and involves no conflict of authority with the guardian, because the will can not operate to any purpose till the death of the testator, and by that same event the authority of the guardian is determined: 18 Pick. 116. To these may be added, as especially applicable to the case of a habitual drunkard, that the chief object of the proceeding by inquisition is the preservation of his property during his lifetime for the benefit of himself and his family, and that the motives which might induce him to make an improper disposition of it during his lifetime, do not exist in relation to a disposition to take effect after his death.

The judgment of the Supreme Court should be affirmed.

5 Am. Dec. 499.

Implied contracts for necessities are good even if the drunkard is under guardianship: 56 Me. 308; 8 N. H. 569.

IV.

ALIENS.

ALIEN FRIENDS: As a general rule, alien friends may contract on the same basis as citizens, and the protection of the Courts is afforded them.

TAYLOR v. CARPENTER.

Circuit Court of the United States, 1844.

3 Story's Repts. 463.

STORY, J. I have not the slightest doubt, in the present case, that a perpetual injunction ought to be granted. The case presented is one of unmitigated and designed infringement of the rights of the plaintiffs, for the purpose of defrauding the public and taking from the plaintiffs the fair earnings of their skill, labor, and enterprise.

Various grounds of objection are suggested in the answer of the defendant, none of which appear to me to be of any validity. First, it is suggested, that the plaintiffs are aliens. Be it so. But in the Courts of the United States, under the Constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretence to say that if a similar false imitation and use of the labels of a citizen put upon his own manufactured articles had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his rights, for which our law would have granted ample redress. There is no difference between the case of a citizen and that of an alien friend, where his rights are openly violated.

Another objection is, that the defendant had not had all descriptions of thread put up on spools, and labelled by the plaintiffs. That, if true, would make no difference. It is sufficient, if there be a violation of their rights by the defendant, in imitating and using any of the labels and spools, with a view to deceive the public. There is no evidence to establish

that the public were either forewarned or forearmed as to the deception. In point of fact, it appears from the evidence that the defendants have imitated and sold both descriptions of spools and labels, red and black, of the plaintiff's.

Again, it is said that other persons have imitated the same spools and labels of the plaintiffs, and sold the manufacture. But this rather aggravates than excuses the misconduct, unless done with the consent or acquiescence of the plaintiffs, which there is not the slightest evidence to establish; or that the plaintiffs ever intended to surrender their rights to the public at large, or to the invaders thereof in particular.

I do not quote cases to establish the principles above stated. They are very familiar to the profession, and are not now susceptible of any judicial doubt. (a) I shall accordingly decree a perpetual injunction.

SMITH ON CONTRACTS, 364.

1 Wharton on Contracts, 94; Bishop on Contracts, 997; Anson on Contracts, 134, note; 1 Chitty on Contracts, 258.

The alien's power to contract respecting realty is restricted by the statutes of many of the States. See Gen. Laws of Minn. 1889, 219, 239.

ALIEN ENEMY: An attempted contract with an alien enemy is utterly void.

SCHOLEFIELD v. EICHELBERGER.

Supreme Court of the United States, 1833.

7 Pet. 586.

JOHNSON, J. The action here is assumpsit to recover the balance of an account current against Eichelberger, survivor of Eichelberger and Clemm, the latter having died during the war. The defence is that the contract was made during war, and therefore void.

The doctrine is not at this day to be questioned that during a state of hostility the citizens of the hostile States are incapa-

(a) See 2 Story Eq. Jurisp. § 951.

ble of contracting with each other. For near twenty years this has been acknowledged as the settled doctrine of this Court, and in a case which proves it to be a rule of very general and rigid application: *The Rapid*. Even the exception commonly quoted of ransom bonds has been shown, I think, in the case of *Potts v. Bell*, to be no exception; since it grows out of a state of war; is, *ex vi termini*, a contract between belligerents; and from its nature carries with it the evidence of the fidelity of the parties to their respective governments. To say that the rule is without exception would be assuming too great a latitude. The question has never yet been examined whether a contract for necessities, or even for money to enable the individual to get home, would not be enforced; and analogies familiar to the law, as well as the influence of the general rule in international law that the severities of war are to be diminished by all safe and practical means, might be appealed to in support of such an exception. But at present it may be safely affirmed that there is no recognized exception but permission of a State to its own citizen, which is also implied in any treaty stipulation to that effect entered into by the belligerents.

Nor do the learned gentlemen who argued this cause controvert the general rule; they only attempt to except this case from its application: First, by an imputed permission on behalf of the United States; Second, by shifting the creation of the contract from the date which appears on its face to the time of delivery of the goods; which, in point of time, were not shipped until after the peace.

On the first of these grounds of exception there is a very strong case on record to show that such a relaxation of the laws of war is not to be inferred from ordinary circumstances, if indeed it may be inferred at all; it is the case of the Count de Wohrenzoff, decided by the Lords of Appeal in the year 1781. It was the case of an importation of French wines from Bourdeaux into Ireland during the war of our Revolution, and the evidence to justify it was that the trade in wines between Dublin and Bourdeaux had been going on from the commencement of the war openly and without interruption from the officers of the customs; nay, that an additional duty had been imposed upon their importation since the commencement of the

war. Yet they were condemned, and their condemnation affirmed. These circumstances are infinitely stronger than those relied on in this case; since the permit to carry on commercial correspondence during the war cannot reasonably imply more than to sanction an innocent correspondence; a correspondence leading only to legal results, not having for its objects any unpermitted acts, or acts inconsistent with the relation of members of hostile States.

It will be perceived here that the Court does not deny the power of belligerent States so to modify the relations of a state of war as to permit commercial intercourse or other intercourse according to their will. They who give the law may modify it, and except from its operation whatever ground they choose to declare neutral. The language of jurists is uniform on this subject, and reason, policy, and humanity sustain the exercise of such a power.

The second ground of exception relied on by the plaintiffs suggests several considerations.

It is insisted that the goods having been shipped subsequent to the war, and coming to possession of the survivor of Eichelberger and Clemm, constituted a sufficient ground of contract, without reference to the time of purchase, the delivery raising the contract for payment, and the receipt by the survivor being the receipt of the firm to which it was shipped.

1. Had the articles of copartnership, or the terms of it, if entered into without written articles, appeared upon the bill of exceptions, the Court would have been called upon to consider this exception with reference to the terms of those articles. There is no doubt that the liability of a deceased copartner, as well as his interest in the profit of a concern, may by contract be extended beyond his death; but without such stipulation, even in case of a copartnership for a term of years: 3 Madd. 245; it is clear that death dissolves the concern. In the absence of proof to the contrary, we can only take this as the case of a general association, without articles extending it beyond the life of Clemm, and then the shipment having been made after his death, and no part of the proceeds having ever come to his use, the case furnishes no good ground for charging his estate.

2. But this is not the true ground on which to place this question. The consideration fatal to the claim of the plaintiffs, that the letter on which these advances were made was in itself a nullity, and could not be made the basis of a contract on which this Court would entertain a suit; the purchases made under it could add nothing to its validity, nor were these goods ever the property of these plaintiffs, for they were purchased for these defendants, and finally shipped to them as their goods, not those of the plaintiffs. The plaintiffs advanced the money; with them the contract was for money paid and expended, but in the purchase and sale of the goods they were but the agents, carrying into effect a contract between the seller and these defendants. Hence the insurance against fire, No. 1, for the loss would have been that of defendants, not of plaintiffs.

These considerations leave no doubt upon the mind of this Court that the decision of the Court below was correct.

The judgment is affirmed.

SMITH ON CONTRACTS, 365.

See the exhaustive case of *Griswold v. Waddington*, 16 John. 438; *Mut. Ben. Life Ins. Co. v. Hillyard*, 37 N. J. L. 444; *Zacharie v. Godfrey*, 50 Ill. 193; *Clark v. Morey*, 10 John. 68; *Cohen v. N. Y. Mut. Life*, 50 N. Y. 610.

V.

SPENDTHRIFTS.

Contracts "other than for necessities" with persons under guardianship, as spendthrifts, are generally made void by the statutes of the various States.

General Statutes of Minnesota, 1878, page 614.

McCRILLIS *v.* BARTLETT.

Supreme Court of New Hampshire, 1837.

8 N. H. 569.

PARKER, J. The statute of this State, after providing that the selectmen may make a complaint to the Judge of probate,

where any person, by excessive drinking, &c., shall so waste, spend, or lessen his estate, &c., as thereby to expose himself or his family to want, or suffering circumstances, or to endanger or expose the town to which he belongs to charge for his or their support, enacts: "That no bargain or sale of real or personal estate, or contract of any nature whatever, made by a person under guardianship for vicious habits, after the appointment is made, and during the continuance of such guardianship, shall be valid in law. And no such bargain, sale, or contract shall be valid, if made after an attested copy of the complaint presented to a Judge of probate upon which a guardian shall be afterwards appointed, and the order of notice thereon shall have been filed with the clerk of the town in which the person complained of resides; unless the guardian, by an instrument under his hand and seal, shall afterwards approve and ratify the same:" N. H. Laws, 341.

The transfer of the notes by McCrillis to the defendant was made after the copies had been duly filed with the town clerk; and as a guardian was afterwards appointed on said complaint, who has not ratified this transfer, it must be held invalid, by the express provision of the statute, and the notes remained the property of McCrillis. This action, therefore, is well maintained, so far as the defendant has received money upon the notes.

But the amount of the note which has not been collected cannot be recovered in this suit. There is no ground upon which that can be held to be money in the defendant's hands.

The statute also avoids any special contract between McCrillis and the defendant, relative to the services and expenditures mentioned in the defendant's set-off. Whatever may have been the agreement between them, *quatenus* a contract, it can have no operation.

But this provision of the statute must have a reasonable construction. It cannot have been intended to render invalid all implied contracts; for such construction might expose the party to actual suffering for the necessities of life, or oblige the town to maintain him and his family as paupers for a time, when he had ample means for their support; and thus produce the very mischief it was intended to prevent. And we are of

opinion that it cannot be construed to prevent the party from binding himself for necessary expenditures, by an implied contract, although a note, or special contract for price or time of payment, would come within its prohibition.

Whether the defendant is entitled to recover anything on his set-off will depend, therefore, upon the question whether those services and expenditures can be regarded as necessary and proper expenditures in resisting the complaint upon probable grounds of success. McCrillis undoubtedly had the right to resist that application. He may have been unable to do so, unless he could in some way raise money for the purpose. But he could neither sell nor borrow by reason of the statute. Were the circumstances such that it was reasonable and proper that the defendant on his application should come in his aid in making a defence? If it was clear that a guardian ought to be appointed, there was no propriety in making a defence for the purpose of procrastination. But if it admitted of reasonable doubt, the statute, we think, could not have been intended to operate so as to deprive McCrillis of his right of trial, and ought not to be so construed.

An inquiry must be had, therefore, whether the services and expenditures were reasonable and proper under the circumstances, and if so, to what extent; and for this purpose the verdict must be set aside, and a

New trial granted.

VI.

MARRIED WOMEN.

At common law, as a general rule, a married woman could not make a valid contract.

TRACY *v.* KEITH.

Supreme Judicial Court of Massachusetts, 1865.

11 Allen, 214.

HOAR, J. The question which these exceptions present is, whether an action can be maintained against a married woman upon a promissory note made by her, which recites that it is for value received, without any further proof to support it. And we can have no doubt that it cannot.

The principle is simply this: By the common law, a married woman is generally incapable of making a valid contract. The recent statutes of the Commonwealth have given her a special, limited power of binding herself by her contracts, under certain circumstances. Unless these circumstances are shown to exist she has no contracting power. The plea of coverture, generally, is therefore a sufficient defence to an action of contract against her, and it is not necessary for her to negative in pleading or proof all possible exceptions.

As a rule of pleading, this appears to be supported by the precedents, and conforms to the rule in analogous cases. To an action on the contract the defendant pleads coverture, and the replication states the facts which bring the defendant within the exception. Or if the coverture is pleaded in abatement to a suit by a married woman, the replication should state the facts which enable her to sue alone: Chit. Pl. (6th Amer. ed.) 484-488, 551. So in a suit against an infant, if infancy is pleaded, the replication may aver that the promise was for necessaries suitable to his estate and degree.

The point seems to have been directly decided in this Commonwealth. In *Gregory v. Pierce*, 4 Met. 478, the question

was whether a husband who had left the Commonwealth had so utterly deserted his wife and renounced his marital rights as to enable her to contract as a *feme sole*; and the Court say, "The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception." And in *Commonwealth v. Williams*, 7 Gray, 337, it was held that the presumption of fact that personal property in the possession of a married woman is the property of her husband, is not changed by the statute enabling married women to hold such property in their own right, and to trade on their own account; and that the party, whose case requires him to prove property in the wife, must rebut such presumption, and show the facts which bring it within the statute, as a case in which the statute declares it to be the separate property of the wife.

Exceptions overruled.

SMITH ON CONTRACTS, 328.

Pond v. Carpenter, 12 Minn. 430; *Farrar v. Bessey*, 24 Vt. 89.

STATUTORY REGULATION.

A married woman's common-law restrictions respecting contracts have been greatly modified by statutes in the several States.

See Gen. Stat. of Minn. 1878, ch. 69, sec. 2.

NORTHWESTERN MUTUAL LIFE INS. CO. *v.* MARY C. ALLIS.

Supreme Court of Minnesota, 1877.

23 Minn. 337.

GILFILLAN, C. J. From the facts found it appears that the defendants are, and, at the several transactions involved, were, husband and wife, and that at St. Paul, on June 1, 1874, they executed their joint promissory note for the payment, to the order of William R. Marshall, two years from said day, of \$10,000, with interest semi-annually, at 10 per cent. per annum, and exchange on New York, which note contained this stipulation: "It being distinctly understood and agreed that should there be any default in the payment of the said inter-

est, as above mentioned, that then, and as often as such default shall be made, the whole of said principal sum, together with all accrued interest thereon, shall immediately become due and payable, at the option of the holder of this note, within thirty days from the time of such default;" and at the same time, to secure said note, they executed to Marshall a mortgage upon real estate, the separate property of Mary C. Allis, which mortgage contained this recital in the description of the note which it was given to secure: "Said note also containing a provision to the effect that should any default be made in the payment of the said interest, or any part thereof, on any day whenever the same is made payable as above expressed, that then, and as often as such default shall be made, the aforesaid principal sum of ten thousand dollars, with all arrearages of interest thereon, shall, at the option of the said party of the second part, or his legal representatives or assigns, become and be due immediately thereafter, and payable within thirty days from the date of such default." There was in the mortgage a covenant that the mortgagors should pay all taxes prior and subsequent to its execution, with the stipulation that in default thereof for thirty days the mortgagee might pay them, and the same should thereupon be due and payable by the mortgagors to the mortgagee, and be deemed secured by the mortgage; "and in default of such payment by the said parties of the first part, their heirs, executors, administrators, or assigns, the whole of the principal sum and interest secured by this mortgage shall, at the option of the said party of the second part, his executors, administrators, or assigns, immediately become due and payable." This note and mortgage were, in August, 1874, transferred by Marshall to plaintiff, now the holder, as collateral security.

The note and mortgage were in fact given to secure an individual debt of the husband, and the money he received thereon was used exclusively for his benefit. Of these facts, however, Marshall had no notice, but he was led to believe, and did believe, that the note and mortgage were given to secure the indebtedness of both defendants.

At the same time of executing this note and mortgage, and as further security for said note and another note for \$4000,

the defendants executed to Marshall a mortgage upon other real estate, the property of the defendant Lorenzo. The property covered by this last mortgage was, at the time of the trial, so heavily encumbered by prior liens as to make it of no value whatever as a security for the payment of the note for \$10,000. Defendants failed to pay the instalment of interest on the \$10,000 note falling due December 1, 1874, and have never paid it.

Taxes levied upon the property were due and unpaid August 28, 1874, and were never paid by either of defendants, but about that time, and before the transfer of the notes and mortgages, were paid by Marshall.

On January 11, 1875, plaintiff served on defendants notice of its election to declare the principal sum of the note and mortgage due. This notice is not set out in the record. Judgment for the foreclosure of the \$10,000 mortgage and sale of the premises was entered, adjudging the amount found due, and that defendants should pay any deficiency. From this judgment it appears that after the trial the plaintiffs paid taxes for the year 1874 to the amount of \$211.15, which in the judgment was added to the amount found due by the finding of the Court. This was done, as it appears, without notice, and simply upon the production of the tax receipt.

Upon these facts the defendant Mary C. claims that no judgment for a deficiency against her should have been rendered for the reason that at the time of the execution of the note and mortgage, she being a married woman, was by statute incapable of making herself liable for the debts of her husband, and that the note and mortgage were given for his debt; that as she stood in the relation of surety for her husband, it was her right to have the security for the debt against her husband's separate property exhausted before resorting to the security against her property; that it was error to add to the judgment the \$211.15; that by the true construction of the note and mortgage the holder could exercise his option to declare the principal due, by reason of a default in the payment of interest, only within thirty days after such default.

The first of these points depends on Laws 1869, c. 56. Section 3 of that Act reads: "No married woman shall be liable

for any debts of her husband, nor shall any married man be liable for any debts or contracts of his wife, entered into either before or during coverture, except for necessities furnished to the wife after marriage, where he would be liable at common law." It is argued that as this note and mortgage were to secure the debt of the husband, she is not liable personally upon them under this section. Apparently a good answer to this is that the obligation of the note and mortgage is her debt as well as that of the husband; and unless the section can be construed as disabling her to make a contract, the consideration for which is a prior debt of her husband, this answer must be conclusive. The defendant claims that, as at the common law the wife was not liable for the husband's debts, the section was not necessary to exclude such liability, and that the section could not have been inserted for that purpose, but must have been for the purpose of disabling her to contract a liability in consideration of such a debt. To give this effect to the section would be to allow inference and conjecture to qualify and restrict the meaning of the clear and precise language of the Act removing the wife's common-law disability to contract. Section 2 provides that "any married woman shall be capable of making any contract, either by parol or under seal, which she might make if unmarried, and shall be bound thereby." Then follow clearly expressed exceptions to her power to contract without her husband, relating only to her real estate. Section 4 expressly retains the common-law disabilities of husband and wife to contract with each other relative to the real estate of either, or to any authority from one to the other to convey real estate, and continues: "But, in relation to all other subjects, either may be constituted the agent of the other, or contract each with the other, as fully as if the relation of husband and wife did not exist." In view of this clear enabling language, and of the clearly expressed exceptions to it, no implication against the force of such language can be allowed from the language of section 3, unless such implication necessarily follows from the presence of the section in the Act. It may not have been strictly necessary to insert the section for the purpose of preventing any question as to the liability of one for the debts of the other, but in view of the difficulties

of the subject it was very proper to be inserted for that purpose, and we think such was its purpose. The note and mortgage were therefore valid.

The power of a Court of equity to control a creditor in enforcing his remedies, so as to protect the interests of a surety, when the creditor has securities for his debt, both upon the property of the principal debtor and also upon that of the surety, and to require the creditor to first exhaust the security against the principal, is undoubted; but to call such power into exercise there must in fact be substantial security against the principal's property. In this case there is no such security, for it is found as a fact that the separate property of the defendant Lorenzo, upon which a mortgage was given to secure this same debt, was so heavily encumbered by liens prior to such mortgage, as to make it of no value whatever as security for the debt in question. As enforcing the mortgage against this property could result only in costs and in delay of the creditor, and would be entirely fruitless of any benefit to it, or of any protection to the surety, the Court below was clearly right in refusing this demand of the defendant Mary C. Allis.

The point made upon the construction of the note and mortgage, as to the time within which the mortgagee should exercise his option to claim the principal due, by reason of a default in payment of the interest, would not, if the Court held with the construction claimed by defendants, affect the result, and therefore is not passed on; for the mortgagee had the right to claim the entire debt to be due by reason of the default as to taxes. The notice served by the mortgagee upon the defendants was at a time when the mortgagee's right of action on account of such taxes was complete; and as the contents of the notice are not before us, we cannot say that the election notified by it was based on any other ground in such a way as to be a waiver of the mortgagee's right to elect upon the ground of default in respect of the taxes. The right still remaining, it was properly exercised by bringing suit. Where the facts in the complaint clearly show a right of option upon several grounds, the election evidenced by the commencement of the action will be deemed to be made by reason of all such grounds unless the contrary clearly appear.

The insertion in the judgment of the \$211.15 was clearly erroneous. It stands upon an entirely different footing from the case of an instalment falling due at any time before judgment, for the facts upon which such instalment may be entered in the judgment are determined by the trial. In respect to these taxes, the facts upon which the plaintiffs' right to recover for them depended arose after the trial, and the defendants never had an opportunity, as they have a right, to litigate them.

The judgment must therefore be modified by striking out the \$211.15, and the case will be remanded for the Court below so to modify it.

Flinn v. Messenger, 28 Minn. 208; *Wagner v. Nagel*, 33 Id. 348; *Plymat v. Brush*, 46 Id. 23; *Bergh v. Warner*, 47 Id. 250.

The power of married women to make valid contracts must be looked for in the statutes of each State.

VII.

Outlaws, persons attainted, persons excommunicated, seamen, convicts, and some others have been subjected to certain restrictions respecting their contract liabilities which are not now sufficiently important to demand an illustrative case.

VIII.

Respecting the contracting ability of municipal and private corporations, joint-stock companies, partners, and agents of all kinds, illustrative cases will be supplied in connection with the lectures on those subjects respectively.

ASSENT.

An *agreement* implies *parties* and their mutual *assent*. Having considered the former, we will next consider the latter.

The assent to a contract must be *mutual*, *reciprocal*, and *concurrent*.

MUTUAL.

In order to have a contract the minds of the parties must *assent* to the same thing.

BRUCE v. BISHOP.

Supreme Court of Vermont, 1870.

43 Vt. 161.

WHEELER, J. The offer of the defendant, upon which the plaintiff relies, was to give the plaintiff forty dollars for the cow if he would deliver her to the defendant in as good condition as she was in when Sleeper bought her. The plaintiff did not then own the cow, and both parties knew that he did not own her. The plaintiff did not accept the offer, but went away expressing an intention to get the cow and drive her to the defendant the next day. If the plaintiff had then accepted the offer, it would not have been a sale of the cow, for the plaintiff did not then have the cow to sell. It would have been an agreement, on the part of the plaintiff, to procure the cow and deliver her to the defendant in as good condition as she was in when Sleeper bought her; and an agreement on the part of the defendant to pay him forty dollars for doing so. But the plaintiff did not accept the offer so as to bind himself to that agreement, therefore the defendant was not bound to his offer. An offer, unaccepted, is not a contract; in such

cases both parties must be bound or neither is. When the parties separated nothing had taken place to impose an obligation upon either, with reference to the cow, until they should meet again, and, upon the facts found, both must so have understood it. The defendant's offer was to give the plaintiff forty dollars for the cow, if he would deliver her to him in a certain condition; not to give him that sum if he would deliver her in the defendant's yard in that condition. This implied that a personal meeting was to be had for the delivery of the cow and payment of the price; and if the plaintiff had accepted the offer so as to have made a contract upon it, a delivery of the cow in the defendant's yard would not have been a performance on the plaintiff's part that would have entitled him to claim that the defendant should perform on his part. When the plaintiff left the cow in the defendant's yard, it was not done in pursuance of any agreement, and the defendant was not bound to take any action with reference to her to prevent liability for her. Suffering the cow to remain in the yard did not bind any agreement, for there was no agreement to be bound. The Court below seems to have held that the facts found made a contract of sale, and that the defendant, by permitting the cow to remain in his yard, without using due diligence to notify the plaintiff that he did not accept her on the contract, so far accepted her that this acceptance bound the contract and made him liable for the price. In this we think there was error.

The defendant and Sleeper were in litigation about the cow, and the plaintiff was in the employment of Sleeper at the time when the parties met. Their conversation commenced in the way of bantering between them about the importance of that litigation, and not in the way of making a trade in the usual course of business. From the testimony referred to, it appears that some of the witnesses, who were there and heard the conversation, when asked whether the conversation was serious or not, answered that they could not tell, but could tell what was said. We think that the circumstances and this testimony did tend to show that the defendant's offer was intended and understood to be merely jocose, and not in earnest, and that the

Court erred in not submitting to the jury to find how the parties, in fact, intended and understood it in that respect.

For these reasons the judgment is reversed, and the cause remanded.

SMITH ON CONTRACTS, 153.

Payne v. Cave, 3 T. R. 148 ; *Gibbs v. Linabury*, 22 Mich. 479 ; *Corning v. Colt*, 5 Wend. 254.

OFFER AND ACCEPTANCE.

MINNEAPOLIS, ETC., R. R. Co. *v.* MILL Co.

Supreme Court of the United States, 1886.

119 U. S. 149.

GRAY, J. The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it: *Eliason v. Henshaw*, 4 Wheat. 225 ; *Carr v. Duval*, 14 Pet. 77 ; *National Bank v. Hall*, 101 U. S. 43, 50 ; *Hyde v. Wrench*, 3 Beavan, 334 ; *Fox v. Turner*, 1 Bradwell, 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom it was made: *Boston & Maine Railroad v. Bartlett*, 3 Cush. 124 ; *Dickinson v. Dodds*, 2 Ch. D. 463.

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfil the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

Such being the legal effect of what passed in writing between the parties, it is unnecessary to consider whether, upon a fair interpretation of the instructions of the Court, the question whether the plaintiff's telegram and letter of December 16 constituted a rejection of the defendant's offer of December 8 was ruled in favor of the defendant as matter of law, or was submitted to the jury as a question of fact. The submission of a question of law to the jury is no ground of exception if they decide it aright: *Pence v. Langdon*, 99 U. S. 578.

Judgment affirmed.

An offer must be assented to in all particulars, and unconditionally, in order to constitute a contract.

BRUCE v. PIERSON.

Supreme Court of New York, 1808.

8 John. 534.

PER CURIAM. The order sent by the defendant to the plaintiffs was for 6 hogsheads of rum and other articles, at a credit of six months; and the plaintiffs sent only 3 hogsheads, and omitted part of the other articles, charging those sent at a credit of three months. This cannot amount to a *contract*. There is no agreement, no *aggregatio mentium* between the parties, as to the thing or subject-matter of the contract. The defendant wished to have the whole of the goods; a part of them might be of no use; and until he assented to receive a part instead of the whole, he cannot be said to have contracted to pay for a part; and there can be no *implied assumpsit* to pay, as the goods sent never came to his hands.

Judgment of nonsuit.

Brown v. R. R. Co., 44 N. Y. 79; Corcoran v. White, 117 Ill. 118; Eggleston v. Wagner, 46 Mich. 610; Potts v. Whitehead, 23 N. J. Eq. 512; Hussey v. Horne-Payne, 8 Ch. D. 670; Harlow v. Curtis, 121 Mass. 320; Hough v. Brown, 19 N. Y. 111.

An acceptance upon terms differing from those in the offer is itself an offer, and, if accepted, becomes a valid contract.

ESMAY v. GORTON.

Supreme Court of Illinois, 1857.

18 Ill. 483.

SCATES, C. J. The Statute of Frauds not being pleaded or set up in the answer, no question arises upon the admission of

parol evidence, in establishing the contract: *Kinsie v. Penrose*, 2 Scam. R. 520; *Dyer v. Martin et al.*, 4 Id. 146; *Tarleton v. Vietes*, 1 Gilm. R. 470; *Switzer et al. v. Skiles et al.*, 3 Id. 529.

The purchase and the terms of sale are very distinctly proven. The defendants, in all things, as far as they could, have complied with the terms, by paying the taxes to Osborn, and tendering to him, for plaintiff, the first payment, amounting to \$1250; and this has been maintained by a deposit of the amount in Court: 2 Bouvier L. Dict. 5, 70, "Tender."

Taking the objections to this contract in detail, we find neither sufficient to prevent a specific enforcement of the agreement, as alleged. The contract need not be on one piece of paper, nor entered into at the same time by both parties. It will be sufficient to connect the several pieces of paper containing the whole of the contract, and which, when connected, show the parties, property, terms, and consideration: *McConnell v. Brillhart*, 17 Ill. R. 354; 2 Parson, Cont. 298; 15 Vermont R. 685; 3 Taunt. R. 169.

While the contract must be mutual, the current of authorities seem to settle the construction of the Statute of Frauds as only requiring the signature of the party to be charged; and the party so charged on bill for specific performance may not allege the want of the signature of the other contracting party: 2 Parson on Cont. 290-1, and notes.

But no question can arise in this case upon the want of writing or signature on the part of defendants, as plaintiff does not insist on the statute; for a parol contract for the sale of land was good at the common law, and, when accompanied by livery of seizin, was a good conveyance of estates lying in livery.

The minds of the contracting parties must meet upon the terms. Where a proposition is made on one side, it must be simply and fully accepted by the other. Where it is submitted in, and sent by letter, it must be accepted as sent, within the time named, if any, and answered as required. If the terms, time, or other part be changed or modified, the case becomes a new proposition, and, until simply accepted, there is no agreement or mutual meeting of minds. This is abundantly established by authorities: *Carr v. Duval et al.*, 14 Pet. R. 77; 17

Ill. R. 354; 3 John. R. 534; 1 Paige R. 434; Eliason *et al. v.* Henshaw, 4 Wheat. R. 225 (4 Cond. R. 432); Chit. on Cont. 12; 2 Sim. and Stu. R. 194 (1 Eng. Ch. R. 195); 9 Barn. and Cress. R. 561 (17 Eng. C. L. R. 443); 4 Mees. and Welsby R. 155; 5 Id. 535.

In the strictest sense, we think defendants have established their alleged contract. They first submitted a proposition, through plaintiff's agent, Osborn, which plaintiff modified, by requiring them to refund to Osborn the taxes advanced for plaintiff for the year past. This was simply accepted, and these taxes refunded within a reasonable time.

In reference to the cash in hand, we think the tender fully met the obligation of the parties. The proposition was to deliver a deed at once, on the conclusion of the purchase, and take back a mortgage to secure the remainder of the purchase-money. Although the papers were to be dated the 1st of May, the cash payment was due on the delivery and exchange of deed, mortgage, and notes. It was plaintiff's fault that this was not done by the 1st of May. The tender in advance of offer to deliver the deed, or refusal to proceed with the sale, was made within a reasonable time after the contract was concluded.

Again, objections are made to the form of deed sent to be executed, and to making payments due at Rock Island Bank, instead of Albany, plaintiff's residence.

A form was submitted, with the proposition, as a suggestion of what would be appropriate and sufficient, rather than as part of the terms. In simply accepting the terms we do not understand this precise form of deed was agreed to. The plaintiff's agent sent a form of deed and mortgage, payable at Rock Island, with the view of executing the *details* of the contract, and not as a new proposition or alteration of the old. So we understand the evidence. If plaintiff was not satisfied with the details proposed, he should have executed and sent a sufficient deed, such as he had suggested with his proposition, with instructions to deliver it when defendants would pay the cash, and deliver notes and mortgage, payable at Albany. This he has not done, but simply refused to proceed. We agree that, where no place of payment is agreed on, the debtor must

seek the creditor at his domicile, or usual place of business, if he have either. See 5 Maine R. 192; *Bixby Exrs. v. Whitney*.

Lastly, objection is made that Osborn was to accept, for his commissions on his agency in the sale, the sum of fifty dollars, which he refuses to do.

This proposition to the agent was part of the same letter containing the proposition to defendants, but was no part of the proposition itself.

These defendants had nothing to do with the settlement of the agent's services. If plaintiff really intended to make that settlement a part of the proposition, he has failed so to word it. He may not now attach it by construction.

Decree affirmed.

Maclay v. Harvey, 90 Ill. 525 ; *Slaymaker v. Irwin*, 4 Whart. 369.

Offers made in jest do not form a basis for a valid contract.

McCLURG v. TERRY.

The Court of Chancery, 1870.

21 N. J. Eq. 225.

THE CHANCELLOR. The complainant seeks to have the ceremony of marriage performed between herself and the defendant, in November, 1869, declared to be a nullity. The ground on which she asks this decree is, that although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the other persons present; and that both parties have ever since so considered and treated it, and have never lived together, or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing to take the other as husband or wife. These statements are corroborated by the witnesses present. The complainant is an infant of nineteen years, and had returned late in the evening

to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace; and all being in good spirits, excited by the excursion, she in jest challenged the defendant to be married to her on the spot; he in the same spirit accepted the challenge, and the justice, at their request, performed the ceremony, they making the proper responses. The ceremony was in the usual and proper form, the justice doubting whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place. After some time the friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice meditated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice from certifying it for record.

Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and, if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. On this part of the case I have no difficulty.

The question whether this Court has jurisdiction in such case, or similar cases, to decree a marriage to be a nullity, is not so free from doubt. The fact of marriage can be determined by any Court where the question arises, from a justice's Court in a suit for goods furnished to the wife, to this Court on a question of alimony and the legality of marriage, and the question whether the ceremony was in jest or earnest could in such cases be determined. But the finding would only bind the parties to that suit. Another suit tried the next day between other parties might reach a different result, and the

judgment in the first suit could not be received even as *prima facie* evidence in the subsequent suit. It could not nullify the marriage relation.

But here the proceeding is *in rem*, strictly so called ; it is upon *the matter* of the marriage, to determine simply whether such marriage exists, and not whether a debt or alimony is due, which depends upon the fact of the marriage. And when a determination is had in a proceeding *in rem*, it binds the whole world and not only the parties to it ; it makes it a marriage or no marriage. Marriage itself is a proceeding *in rem*, and constitutes the parties man and wife ; divorce is also—it dissolves an existing marriage. The grant of administration, and the judgment of the Admiralty Courts in cases of prize or maritime liens are proceedings *in rem*, and change and vest the rights and the property concerned. And in all these cases strangers are bound by transactions at which they were not present, and proceedings to which they were not parties or privy. In England, the ecclesiastical Courts had jurisdiction of marriage and matrimonial causes ; they had power to declare a marriage void, and their judgment was final. These Courts have never been established in this State. Under the colonial government, the governor was invested with the power of the ecclesiastical Courts, so far as testamentary causes and marriage licenses were concerned. The first Constitution of the State declared the governor to be the Ordinary, and the present declares the Chancellor to be Ordinary. But the Act of December 16, 1784, like the existing Act concerning the Prerogative Court, restrained the jurisdiction to the granting probate of wills and letters of administration and guardianship, and to disputes arising out of the same, with the addition of marriage licenses ; and the Ordinary in New Jersey has never exercised jurisdiction in matrimonial causes. The Act of 1794 (Pat. Laws 143) gave to the Court of Chancery jurisdiction of “all causes of divorce,” but added, as does the Act now in force, “by this Act directed and allowed.” Neither Act directs or authorizes a divorce or decree of nullity in case of a mere formal ceremony like this, or in case of a ceremony procured by fraud or compulsion. Until the present Constitution was adopted, the Legislature had and exercised the power of divorce,

and declaring the marriage contract void. A statute for that purpose operated *in rem*, and dissolved the relation. The Constitution took away that power and vested the chancery powers in the Chancellor. Among these powers was that of granting divorces as then established. A literal construction of these Acts and constitutional provisions would not seem to vest in this Court the power of declaring marriages void, except in the cases specified, and yet a liberal construction, guided by what was evidently the design of these provisions, might extend the jurisdiction of this Court to this class of cases. In every well-ordered government it is proper that there should be some tribunal or power competent finally to determine the validity of so important a matter as marital relation, so that parties may know their obligations and rights, and that this should not be left to be determined differently by each Court, where the question might incidentally arise. And when the power over this subject was taken from the Legislature, it is fair to infer it was intended to be left with this Court, upon which jurisdiction over most causes of divorce had been directly conferred.

In the State of New York, Chancellor KENT and Chancellor SANDFORD, both held, with statutes more restricted than that of New Jersey, that the power of declaring marriages void for fraud or force, was vested in the Court of Chancery: *Aymar v. Roff*, 3 J. C. R. 49; *Wightman v. Wightman*, 4 Id. 343; *Ferlat v. Gojon*, 1 Hopk. 478.

And the Supreme Court of the State of Vermont, in *Clark v. Field*, 13 Vt. 460, on an appeal from chancery, in a well-considered opinion delivered by Chief Justice WILLIAMS, held that the Courts of Chancery of that State had the power, without any direct delegation of it for that purpose, to declare a marriage procured by fraud and force to be void.

I am satisfied that this Court has the power, and that this is a proper case to declare this marriage a nullity.

Keller v. Holderman. 11 Mich. 248.

An agreement to attend the theatre, or to dine or ride together, is not a contract, unless made with intention of establishing new legal relations between the parties.

An offer is not binding until fully assented to, and the *assent* must be *expressed* by some appropriate word or act. A mere mental assent is insufficient.

WHITE v. CORLIES.

Court of Appeals, 1871.

46 N. Y. 467.

Where a carpenter received an order to do certain work, and he purchased the lumber necessary, and commenced the labor upon it, without in any other way accepting the offer :

Held, that such an act was not a sufficient expression of assent, as such purchase and labor might have been for any other like order.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September 30th was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of

the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance, become such because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned Judge was fairly to be understood by the jury as laying down the rule to them that the plaintiff need not indicate to the defendants his acceptance of their offer: and that the purchase of stuff and working on it after receiving the note made a binding contract between the parties. In this we think the learned Judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.

SMITH ON CONTRACTS, 153.

1 Wharton on Contracts, sec. 22.

The offer may be accepted by acts as well as by words, as in the case of implied contracts.

DAY *v.* CATON.

Supreme Judicial Court of Massachusetts, 1876.

119 Mass. 513.

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct: Chit. Con. (11th Am. ed.) 86; Wells *v.* Banister, 4 Mass. 514; Knowlton *v.* Plantation No. 4, 14 Maine, 20; Davis *v.* School District in Bradford, 24 Id. 349.

The plaintiff, however, contends that the presiding Judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made: Taft *v.* Dickinson, 6 Allen, 553. It must be shown that in some manner the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference: Abbot *v.* Hermon, 7 Greenl. 118; Hayden *v.* Madison, 7 Id. 76. And when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a struc-

ture (of which he must necessarily avail himself afterwards in his proper use thereof,) such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, *Qui tacet consentire videtur*, is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak: *Lamb v. Bunce*, 4 M. & S. 275; *Conner v. Hackley*, 2 Met. 613; *Preston v. American Linen Co.*, *ante*, 400.

If a person saw day after day a laborer at work in his field doing services which must of necessity enure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding Judge.

Exceptions overruled.

Huck v. Flontye, 80 Ill. 262; *De Wolf v. Chicago*, 86 Id. 443.

Where one makes an offer, and another acts upon it, under circumstances practically expressing his assent, the contract is concluded.

REIF v. PAIGE.

Supreme Court of Wisconsin, 1882.

55 Wis. 503.

LYON, J. 1. It is maintained on behalf of the defendant that in no event was there a cause of action against him until after due notice to him that the plaintiff had rescued the body of his wife from the flames, with knowledge of the offer of a reward for so doing, and on the faith of that offer; in other words, that such notice is a condition precedent to the plaintiff's right of action. If this position is correct, the performance of such condition precedent must be averred in the complaint, either specifically or by authorized general averment, and, if denied, must be proved on the trial, or the plaintiff cannot recover. The complaint alleges that "the plaintiff has fully performed all of the conditions of said contract upon his part to be performed." This mode of pleading performance of condition precedent is authorized by statute, and hence the same are sufficiently pleaded: R. S. 728, sec. 2674. The answer does not deny that averment of the complaint, either specifically or by general denial. Hence, the plaintiff was not required to prove the averment on the trial. Moreover, the failure to give such notice (if the notice was required) goes only in abatement of the action, and it may well be doubted whether even a general denial would make an issue on the question as to whether the notice had been given. It would seem that, regularly, mere matter in abatement of an action, to be available, should be pleaded, especially when, as in this case, such matter is negatived in the complaint. However, the point is not here determined. But inasmuch as the defendant introduced evidence, without objection, tending to show that he received no such notice of the plaintiff's acceptance of the alleged offer of a reward, and as it is quite competent for the

Court to permit an amendment making the answer correspond with the proofs in that behalf, it becomes our duty to determine the question of the necessity of such notice.

The offer of a reward by the defendant for rescuing the body of his wife, and the rescue of her remains by the plaintiff, with knowledge of such offer, and with a view to obtaining the reward offered, constituted a contract between the parties, which was fully and completely executed by the plaintiff. The offer, which the proofs tend to show the defendant made, was, in substance: "I will give \$5000 to any person who will bring the body of my wife out of that building, dead or alive." There were no restrictions or limitations to the offer, and no additional requirement upon the claimant of the offered bounty. Hence, when the plaintiff, with a view of obtaining the offered reward, rescued the body of Mrs. Paige, he had done all that the offer required him to do, and if he has any cause of action it was then complete. There may be a conflict of authority on this question, but it seems to us that the better reasons are with the cases cited on behalf of the plaintiff, holding that in such a case the giving of the notice is not a prerequisite to maintaining an action for the reward. The soldiers' bounty cases in this Court, cited in opposition to this view, are not in point, because in those cases it was absolutely necessary that the towns of municipalities should know when their quotas were full. Hence the necessity that each person who enlisted for the bounty should promptly notify the proper authorities of the town or city to which he was credited of the fact of his enlistment. No such reason exists here for requiring notice. There is no more hardship in this rule than in the rule which allows the indorsee and holder of an overdue negotiable promissory note to sue the maker thereon without giving him an opportunity to pay it without suit. The maker may have been ready and anxious to pay it at the time it became due, had he known where it was. Yet the holder may sue it at his leisure, and compel the maker to pay costs, and, in general, the accrued interest as well. That hardship is possibly because the contract evidenced by the note is complete, and nothing remains to be done by the holder after the note becomes due to give him a right of action upon it. On precisely the same principles we

think in this case that after the plaintiff had performed the only condition stipulated for in the alleged offer his right of action was complete, without doing any other act whatever.

2. The learned Circuit Judge nonsuited the plaintiff on the ground that it was his duty as a paid officer and member of the fire department of Oshkosh to rescue persons as well as property from fires, and that it is against sound public policy to allow him to contract for a reward for recovering the body of Mrs. Paige. Also, that in such a case there is no valid consideration for the offer, moving from one whose duty it is to do the act. The learned counsel for the respective parties have argued this branch of the case (as well as the other) with great candor and ability, and each has cited numerous adjudications in support of his theory of the case. Their arguments and concessions have brought the question upon which the case must turn within very narrow limits. Counsel for the plaintiff concedes that if it was the duty of his client as a fireman to go into the burning building and remove therefrom the remains of Mrs. Paige, he cannot recover the reward, but contends that it was not his duty to do so under the circumstances of the case. Counsel for the defendant, while not contending that it was the duty of the plaintiff as a fireman to imperil his life by going into the building for Mrs. Paige, or that the act was not a very perilous one, maintains that it was in the nature of extra or extra hazardous services in the line or scope of his duty, and, being so, the law will not permit him to contract for a reward for doing the act.

There was considerable discussion by counsel as to what are the duties of firemen. We know of no guide for ascertaining those duties other than the charter of the municipality in which they are employed, and the ordinances or by-laws enacted pursuant thereto. The ordinances of the city of Oshkosh in respect to its fire department were read in evidence, and reference made to the city charter in that behalf. We do not care to comment upon these, for we are clear that there is nothing in them which made it the duty of the plaintiff to enter the fourth story of the burning building and rescue the body of Mrs. Paige from the flames, at the imminent hazard of losing his own life. That he incurred such hazard there can

be no doubt from the testimony. He did not, as does a soldier, contract to risk his life in the service. The most that can reasonably be claimed is that, short of risking his life, he contracted to use his best judgment and efforts in extinguishing fires, and in saving persons and property from destruction or injury. But it is quite doubtful whether a fireman employed under the charter and ordinances of Oshkosh owes any duty, *as a fireman*, to rescue persons from burning buildings. Both charter and ordinances are silent on the subject, although an ordinance requires them to aid in the removal of endangered goods and property. It may well be that for the rescue of persons in peril from a conflagration the legislature or common council relied upon the promptings of humanity, which in such emergencies always insures the utmost efforts of all who can aid therein, whether firemen or not, to save the lives of those in peril. But whether a fireman owes any such duty by reason of his employment is not here determined. We assume, for the purposes of this case, that he does, and have stated above the limits of that duty, if it exists.

On this hypothesis, the precise question to be determined is whether the fact that it was not, under the circumstances, the duty of plaintiff as a fireman to rescue the body of Mrs. Paige, renders him competent to make a valid contract for a reward for so doing. It is difficult to perceive how it can properly be said that it was within the scope or line of the plaintiff's duty to do the act, when it was not his duty to do it. It is conceded, for the purposes of the case, that it was his duty as a fireman to rescue Mrs. Paige from the flames if he could do so without hazarding his own life. It was not his duty to do so at the hazard of his life. Can it properly be said that it was in the line or scope of his duty to rescue her at the imminent peril of losing his life, when his duty did not require him to do so? We confess our inability to perceive any satisfactory grounds upon which this question may be answered affirmatively.

In the law of agency we find that principals are often held responsible for the unauthorized acts of their agents because such acts are within the scope of the authority of such agents, although not within their actual authority. The prin-

principal is held in such a case because he has clothed his agent with *apparent* authority to do the act, and a person to whom the agent is accredited may deal with him on the faith that he has the authority to bind his principal which he *appears* to have, and may hold the principal as effectually as though the agent had actual authority in the premises. Hence, when it is said that a given act of an agent, although unauthorized, is within the scope of his authority, and therefore binds his principal, it only signifies that the principal has *apparently* given his agent authority to do the act, and, as against a person dealing with the agent in good faith, he shall not be heard to deny the agent's authority.

But where the question is one of *duty*, there seems to be no room for the application of any such principle. If it is not the duty of a person to render a specified service, we fail to comprehend how it can correctly be said that the service is within the line or scope of his duty; that is to say, that although it is not actually his duty to render the service, yet, because it is his apparent duty to do so, he shall be held to the same consequences as though it were his actual duty. It seems to us that the mere statement of the proposition is sufficient to show that it is untenable.

The respective counsel have cited and commented upon numerous cases bearing upon the question under consideration. There is some apparent conflict of doctrine in them. In many of those cited on behalf of the defendant, claimants of rewards have been defeated because (as it is said) it was within the line or scope of their duties as officers, or otherwise, to render the services for which the rewards were offered. Yet in some of these cases it was held that it was the duty of the claimants to render those specific services. The cases cited on behalf of the plaintiff fully sustain the position of his counsel, that, unless it was the duty of the plaintiff as a fireman to rescue the body of Mrs. Paige, he is in a position to claim the alleged reward. A reference to these cases will be found in the report of the arguments, and it is unnecessary to cite them here. To state these cases in detail, and to comment upon them here, would unreasonably extend this opinion, which, perhaps, is already too long, and would serve no useful purpose. We must content

ourselves, therefore, with the foregoing general observations upon them.

It follows, from the view above expressed, that inasmuch as the plaintiff could not rescue the body of Mrs. Paige from the burning building without imminent peril of losing his own life, and inasmuch as it was not his duty as a paid officer and member of the fire department to do so, he is in a position to claim the reward alleged to have been offered by the defendant for such rescue.

The judgment of nonsuit must be reversed, and the cause will be remanded for a new trial.

By THE COURT. It is so ordered.

The offer need not necessarily be made to a particular person, but it may be made to the public generally, as in cases where a reward is offered for the return of lost property, or for the capture of criminals.

WENTWORTH *v.* DAY.

Supreme Judicial Court of Massachusetts, 1841.

3 Met. 352.

SHAW, C. J. Although the finder of lost property on land has no right of salvage, at common law, yet if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him, and, in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it, as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have done: *Symmes v. Frazier*, 6 Mass. 844.

But the more material question is, whether, under this offer of reward, the finder of the defendant's watch, or the father, who acted in his behalf and stood in his right, had a lien on the watch, so that he was not bound to deliver it till the reward was paid.

A lien may be given by express contract, or it may be implied from general custom, from the usage of particular trades, from the course of dealing between the particular parties to the transaction, or from the relations in which they stand, as principal and factor: *Green v. Farmer*, 4 Burr. 2221. In *Kirkman v. Shawcross*, 6 T. R. 14, it was held, that where certain dyers gave general notice to their customers, that on all goods received for dyeing, after such notice, they would have a lien for their general balance, a customer dealing with such dyers, after notice of such terms, must be taken to have assented to them, and thereby the goods became charged with such lien, by force of the mutual agreement. But in many cases the law implies a lien, from the presumed intention of the parties, arising from the relation in which they stand. Take the ordinary case of the sale of goods, in a shop or other place, where the parties are strangers to each other. By the contract of sale, the property is considered as vesting in the vendee; but the vendor has a lien on the property for the price, and is not bound to deliver it till the price is paid. Nor is the purchaser bound to pay till the goods are delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption that it was not the intention of the vendor to part with his goods till the price should be paid, nor that of the purchaser to part with his money till he should receive the goods. But this presumption may be controlled by evidence proving a different intent, as that the buyer shall have credit, or the seller be paid in something other than money.

In the present case, the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was, that whoever should return his watch to the printing-office should receive twenty dollars. No other time or place of payment was fixed. The natural, if not the necessary, implication is that the acts of performance were to be mutual and simultaneous; the one to give up the watch on

payment of the reward, the other to pay the reward on receiving the watch. Such being, in our judgment, the nature and legal effect of this contract, we are of opinion that the defendant, on being ready to deliver up the watch, had a right to receive the reward in behalf of himself and his son, and was not bound to surrender the actual possession of it till the reward was paid; and therefore a refusal to deliver it without such payment was not a conversion.

It was competent for the loser of the watch to propose his own terms. He might have promised to pay the reward at a given time after the watch should have been restored, or in any other manner inconsistent with a lien for the reward on the article restored; in which case no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser. It was for the latter to consider whether such an offer would be equally efficacious in bringing back his lost property as an offer of a reward secured by a pledge of the property itself; or whether, on the contrary, it would not afford to the finder a strong temptation to conceal it. With these motives before him, he made an offer to pay the reward on the restoration of the watch, and his subsequent attempt to get the watch without performing his promise is equally inconsistent with the rules of law and the dictates of justice.

The circumstance, in this case, that the watch was found by the defendant's son, and by him delivered to his father, makes no difference. Had the promise been to pay the finder, and the suit were brought to recover the reward, it would present a different question. Here the son delivered the watch to the father, and authorized the father to receive the reward for him. If the son had a right to detain it, the father had the same right, and his refusal to deliver it the owner, without payment of the reward, was no conversion.

Judgment for the defendant.

Pierson v. Morch, 82 N. Y. 503; *First Nat. Bk. v. Hart*, 55 Ill. 62.

An offer by *mail* may be accepted in the same manner, and if accepted within a reasonable time, and before revocation, the contract is closed when the acceptance is dispatched.

TAYLOR *v.* THE MERCHANTS' FIRE INS. CO.
Supreme Court of the United States, 1850.
9 How. 391.

NELSON, J. This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the Court below was this: William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg, in that State, for an insurance upon his dwelling-house to the amount of \$8000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company stating that the risk would be taken at seventy cents on the hundred dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding: "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day,

mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling house in the mean time, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy, or pay the loss.

A bill was filed in the Court below by the insured against the company, setting forth substantially the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice ; but the principal one is that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defence.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance ; and,

2. The non-payment of the premium.

The first position assumes that where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed ; that the contract is still open and incomplete until the notice of acceptance is received ; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice ; and this even without communicating notice of the withdrawal to the applicant ; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For if the contract is still open until the company

is advised of an acceptance, it follows of course that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated ever to perfect a contract by correspondence if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated ; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them ? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed ?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration ; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company ; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent ; for on communicating to the insured the terms received from the company he observes : " Should you desire to effect the above insurance, send me your check payable to my order

for fifty-seven dollars, and the business is concluded ;” obviously enough importing that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of *Adams v. Lindsell*, 1 Barn. & Ald. 681, and *Mactier’s Adm’rs v. Frith*, 6 Wend. 104, are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted in due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is, also, the effect of the case of *Eliason v. Henshaw*, 4 Wheat. 228, in this Court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

2. The next position against the claim is the non-payment of the premium.

One of the conditions annexed to the policies of the company is that no insurance will be considered as made or binding until the premium be actually paid ; and one of the instructions to the agent was that no credit should be given for premiums under any circumstances.

But the answer to this objection is that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise ; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment ; and accordingly we find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn at all times from the date of the check till it was received by the agent, sufficient to meet it ; and that it would have been paid on presentment.

It is not doubted that if the check for the premium had been

received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts in judgment of law to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction.

II. Another objection taken to the recovery is that the usual preliminary proofs were not furnished according to the requirement of the seventh article of the conditions annexed to the policies of the company. These are required to be furnished within a reasonable time after the happening of the loss. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not furnished till the 24th of November, 1845. This was, doubtless, too late, and the objection would have been fatal to the right of the complainant if the production of these proofs were essential to the recovery.

But the answer is that the ground upon which the company originally placed their resistance to the payment of the loss, and which is still mainly relied on as fatal to the proceedings, operated as a waiver of the necessity for the production of the preliminary proofs; and that is that no obligation to insure the loss was ever entered into by the company, the contract being incomplete at the time it occurred. On this ground they refused to issue the policy, which would have imposed upon the insured a strict compliance with its conditions, or to recognize any obligations arising out of the arrangement between him and their agent.

The objection went to the foundation of the claim, which, in connection with the refusal to issue the policy, superseded the necessity of producing these proofs; as the production would have been but an idle ceremony on the part of the insured in the further prosecution of his right. Why produce them after the company had denied the contract and refused the policy?

The case of the *Columbian Insurance Company v. Lawrence*, 2 Peters, 25, has been referred to on this point. An objection

was there taken on the trial to the sufficiency of the preliminary proofs, on the ground that the certificate of the magistrate was not in conformity with the ninth article of the conditions. The particular objection had not been taken by the company when the proofs were furnished, although several others had been, to their liability ; and the Court left to the jury the question, among others, whether the company had not thereby waived the objection to the sufficiency of the certificate.

The plaintiff recovered ; and on the motion for a new trial, among other grounds assigned for granting it, was this instruction of the Court. It was held that there was no evidence in the case from which the jury could properly infer a waiver.

The preliminary proofs had been presented to the company on the 16th of February, 1824, soon after the loss. The suit was discontinued, and a new certificate procured from the magistrate correcting the defects in the first, and furnished to the company on the 14th of February, 1829, five years after the first had been delivered. A new suit was brought, and the case as reported a second time will be found in 10 Peters, 507.

On the second trial the objection was taken that the certificate had not been produced within a reasonable time after the loss ; but the Court held otherwise, placing their decision upon the ground that the laches were not properly imputable to the insured, but to the company, on account of their neglect to give notice of the defect when the first certificate was presented, and of the mistaken confidence which the party had placed in them. The Court say: "If the company had contemplated the objection, it would have been but ordinary fair dealing to have appraised the plaintiff of it ; for it was then obvious that the defect might have been immediately supplied ; as it was, the company, unintentionally it may be, by their silence misled him."

It is manifest, on an examination of the two cases, that the doctrine of the first on this point of waiver was virtually overruled, for if maintained in the second it would have upheld the ruling at the Circuit in the first. The reasons given in support of the corrected certificate, procured and furnished some five years after the loss, are cogent and unanswerable in favor of the position that the conduct of the company in not objecting to

the defect in the first one at the time it was furnished, operated to mislead the party, and should have been regarded as a waiver of the objection.

The cases are very full upon this point, and clearly establish the position that the preliminary proofs, under the circumstances stated in this case, were dispensed with by the company, as inferrible from the ground upon which they placed their denial of liability: 9 Wend. 165; 25 Id. 378, 382; 6 Harr. & Johns. 412; 6 Cow. 404.

III. It has also been objected that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a Court of equity; which may very well be admitted.

But it by no means follows from this that a Court of Chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that Court to enforce a specific performance, and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party therefore had a right to resort to a Court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that Court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of *Motteux v. The London Assurance Company*, 1 Atk. 545, and in *Perkins v. The Washington Insurance Company*, 4 Cow. 646. See also 1 Duer, 66 and 110, and 2 Phillips, 583.

As the only real question in the case is the one which a Court of equity must necessarily have to decide in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that Court to turn the party over to his remedy at law upon the policy.

And no doubt it was a strong sense of this injustice that led the Court at an early day to establish the rule that having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the Court to proceed and do final and complete justice between the parties, where it could as well be done in that Court as in proceedings at law.

IV. It is further objected that, admitting the claim to be properly enforceable in equity, still the complainant is not entitled to the relief sought on the ground that the bill contains no sufficient statement of the contract, or of the performance of the conditions, and also for want of a proper prayer.

We are of opinion that these several objections are not well founded. The contract as set forth we have already considered, and held complete and binding on the company; and further, that the denial of having entered into the agreement, and refusal to issue the policy, also set forth, are sufficient ground upon which to infer a waiver of the production of the preliminary proofs, as a condition of liability; and if sufficient ground to infer a waiver, it was of course unnecessary to set forth these proofs in the bill. And as to the prayer, it is sufficient to say that the prayer for general relief which is here found will enable the Court to make such a decree as the complainant may show himself entitled to, upon the facts set forth in the stating part of the bill.

The pleading is not very formal, nor very cautiously drawn, and in the absence of the prayer for general relief might have led to embarrassment in making the proper decree in the case. There is a specific prayer for a decree for the loss, but it would have been more formal and appropriate, regarding the ground of jurisdiction in these cases, to have added also a prayer for a specific performance of the agreement to insure.

But the particular relief permitted under a general prayer, where the statement in the body of the bill is sufficient to entitle the party to it, meets the difficulty suggested, and well warrants the decree proposed to be entered: Story, Eq. Pl., §§ 41, 42, and cases.

Upon the whole, without pursuing the examination further, we are of opinion that the decree of the Court below should be reversed, and that the cause be remitted, with directions to the

Court to take such further proceedings therein as may be necessary to carry into effect the opinion of this Court.

See note to above opinion.

The contract is good though the letter of acceptance is never received. *Howard v. Daly*, 61 N. Y. 362 ; *Washburn v. Fletcher*, 42 Wis. 151.

It is also good even if the offerer has posted a letter withdrawing the offer before the letter of acceptance is dispatched.

Wheaton v. Cross, 31 Md. 99.

The party making the offer can if he wishes, make the acceptance depend upon actual communication thereof to him.

LEWIS v. BROWNING.

Supreme Judicial Court of Massachusetts, 1881.

130 Mass. 173.

GRAY, C. J. In *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 278, this Court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in *Langdell on Contracts* (2d ed.), 989-996. In England, New York, and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post-office duly addressed: *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlap v. Higgins*, 1 H. L. Cas. 381, 398-400; *Newcomb v. De Roos*, 2 E. & E. 271; *Harris's Case*, L. R. 7 Ch. 587; LORD BLACKBURN in *Brogden v. Metropolitan Railway*, 2 App. Cas. 666, 691, 692; *Household Ins. Co. v. Grant*, 4 Ex. D. 216;

LINDLEY, J., in *Byrne v. Van Tienhoven*, 5 C. P. D. 344, 348; 2 Kent Com. 477, note c.; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 1 Kernan, 441; *Trevor v. Wood*, 36 N. Y. 307; *Hallock v. Commercial Ins. Co.*, 2 Dutcher, 268, and 3 Dutcher, 645; *Tayloe v. Merchants' Ins. Co.*, 9 How. 390.

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. THESIGER, L. J., in *Household Ins. Co. v. Grant*, 4 Ex. D. 223; Pollock on Con. (2d ed.) 17; Leake on Con. 29, note. And in the case at the bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'yes' or 'no.' If 'no,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.' " Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a despatch at the telegraph office had the same effect as the mailing of the letter, he has no ground of exception to the ruling at the trial.

Exceptions overruled.

Haas v. Myers, 111 Ill. 421.

An offer made by *telegram* can be accepted in the same way, and the contract is closed when the acceptance is dispatched, *provided the parties have agreed to negotiate by wire.*

TREVOR v. WOOD.

Court of Appeals, 1867.

36 N. Y. 306.

SCRUGHAM, J. The offer of the respondents was made on the 31st of January, and they did not attempt to revoke it until the 3d of February. The offer was accepted by the appellants before, but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case, is whether a contract was created by this acceptance before knowledge of it reached the respondents.

The case of *Mactier v. Frith*, in the late Court of Errors (6 Wend. 103), settles this precise question, and was so regarded by this Court in *Vassar v. Camp*, 1 Kern. 432, where it is said that the principle established in the case of *Mactier v. Frith* was that it was only necessary "that there should be a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act; and that the sending of a letter announcing a consent to the proposal was a sufficient manifestation and consummated the contract from the time it was sent."

There is nothing in either the case of *Mactier v. Frith*, nor in that of *Vassar v. Camp*, indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office, and in fact the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus marking that "*aggregatis mentium*" which is necessary to constitute a contract.

Mr. Justice MARCY, in delivering the leading opinion in *Mactier v. Frith*, says: "What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind unacted on can never be an acceptance. Where the offer is by letter the usual mode of acceptance is by the sending of a letter announcing a consent to accept; where it is made by a messenger a determination to accept returned through him or sent by another would seem to be all the law requires if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence under certain circumstances is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract."

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. In accordance with this agreement the offer was made by telegraph to the appellants in New York, and the acceptance addressed to the respondents in New Orleans, and immediately dispatched from New York by order of the appellants. It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them as that by means of which their business should be transacted.

Under these circumstances the sending of the dispatch must be regarded as an acceptance of the respondents' offer and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication the parties mutually assume its hazards, which are principally as to the prompt receipt of the dispatches.

The referee finds as a fact that the respondents answered the telegram of the appellants asking at what price they would sell 100,000 Mexican dollars by another telegram as follows, viz. :—

“TREVOR & COLGATE, New York.

“Will deliver fifty thousand at seven and one-quarter per Moses Taylor. Answer.

“JOHN WOOD & Co.”

It was proved on the trial that this telegram was sent by the respondents, and a letter of the same date, signed by them, repeating the telegram and stating that they had sent it, was read in evidence.

This affords sufficient evidence of subscription by the respondents to take the case out of the Statute of Frauds.

The judgment should be reversed.

Gray on Communications by Telegraph, 112, and cases cited.

In absence of any agreement to negotiate by wire, the offer is probably accepted when the acceptance is delivered to the company for transmission : Gray, *supra*.

REVOCATION.

An offer may be withdrawn at any time before it is accepted.

WEIDEN *v.* WOODRUFF.

Supreme Court of Michigan, 1878.

38 Mich. 130.

MARSTON, J. Defendant in error sought to recover in an action of assumpsit upon the following instrument:—

“GRAND RAPIDS, Sept. 14, 1874.

“Messrs. Isaac Woodruff & Co., General Agents of the Pharos Lightning Rod Company, Grand Rapids, Mich.—You will please send me galvanized lightning-rods for my house within sixty days, for which I will give you thirty-five cents per foot, due when work is completed.

H. WEIDEN.

“Ten per cent. discount to be given on whole amount.”

Plaintiff proved that under this order he had delivered 206 feet of lightning-rod.

Defendant, claiming that this written instrument did not constitute a complete binding contract between the parties, offered to prove the conversation between plaintiff's agent and defendant at the time this order was given; that defendant reserved the right to countermand the order at any time within the sixty days; that he did in fact within that time, and before any of the rod was delivered, actually countermand the order; and he further offered to prove that at the time the order was given the number of feet of rod to be delivered was agreed upon. This evidence was all objected to and excluded, and plaintiff recovered judgment for the amount claimed.

1. This written order did not constitute such a written contract between the parties as would exclude parol evidence, or prevent the defendant from showing any further agreement entered into between the parties at the time the order was given, and not embraced therein: *Richards v. Fuller*, 37 Mich. 161; *Phelps v. Whitaker*, Id. 72, and cases there cited.

2. This instrument was but a mere order. Woodruff was not bound by it in any way to deliver any rod. Until accepted by him it was not binding upon either party. Woodruff testified that he passed upon all orders taken by his agents; if he considered the parties good he delivered the orders, and that if he doubted the responsibility of the party who gave the order he had the right to reject it. Under such circumstances, it is preposterous to say that there was a valid binding contract between the parties before Woodruff had accepted the order and in some way notified the defendant of that fact. Even independent of such testimony, before an actual acceptance and notice thereof, the defendant had the right to withdraw his order. It is similar to an order given a merchant for goods, which before acceptance the party would have a right to withdraw: 1 *Parsons on Con.* (5th ed.) 483.

The judgment must be reversed with costs, and a new trial ordered.

The other Justices concurred.

SMITH ON CONTRACTS, 160.

Tucker v. Lawrence, 56 Vt. 467; *Quick v. Wheeler*, 78 N. Y. 300; *Cooke v. Oxley*, 3 T. R. 653.

The offer may lapse in four ways :—

1st. By the death or insanity of either party : *Pratt v. Trustees*, 93 Ill. 475 ; *Beach v. M. E. Church*, 96 Id. 177.

2d. By the expiration of the time allowed in the offer for acceptance : *Longwood v. Mitchell*, 26 Oh. St. 334 ; *Potts v. Whitehead*, 20 N. J. Eq. 55.

3d. By its non-acceptance within a reasonable time after the offer is made : *Loring v. Boston*, 7 Met. 409 ; *Chicago, etc., R. R. Co. v. Dane*, 43 N. Y. 240 ; *Larman v. Jorden*, 56 Ill. 204.

4th. By failure to accept in the manner prescribed in the offer as to place or otherwise : *Eliason v. Henshaw*, 4 Wheat. 225.

The offer may be *withdrawn* by notice of withdrawal : *Stevenson v. McLean*, 5 Q. B. D. 346.

Also by sale of the thing offered, if the sale is known to the other party : *Dickenson v. Dodds*, 2 Ch. D. 463.

Where the offer is made to the public, as in case of a reward offered, the withdrawal may be made in the same manner as was the offer.

SHUEY v. UNITED STATES.

Supreme Court of the United States, 1875.

92 U. S. 73.

STRONG, J. We agree with the Court of Claims, that the service rendered by the plaintiff's testator was not the apprehension of John H. Surratt, for which the War Department had offered a reward of \$25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different ; and, while a reward of \$25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found, as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures

made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the “liberal reward” promised for information conducing to the arrest; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before any thing had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did any thing to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

Judgment affirmed.

A person making an arrest in ignorance of the offer is not entitled to the reward: *Stamper v. Temple*, 44 Amer. Dec. 296, 6 Hum. 113; *Lee v. Flamingburg*, 7 Dana, 28. But see *Russell v. Stewart*, 44 Vt. 170; *Dawkins v. Sappington*, 26 Ind. 199. See, also, *Fitch v. Snedaker*, 38 N. Y. 248; *Ball v. Newton*, 7 Cush. 599.

RECIPROCAL.

The assent necessary to a valid contract must be not only *mutual*, but it must be free from duress, mistake, undue influence, misrepresentation, and fraud.

DURESS.

A contract procured by means of duress may be avoided by the party upon whom the duress was practised.

FOSHAY *v.* FERGUSON.

Supreme Court of New York, 1843.

5 Hill, 154.

BRONSON, J. If the defendant arrested the plaintiff under pretence that he had a warrant when in fact he had none, or if he arrested the plaintiff under a warrant issued by a justice of the peace in the county of Herkimer, which had not been endorsed in Schoharie, the imprisonment was in either case unlawful, and a contract procured by such means cannot be supported. It wants the essential ingredient of the free assent of the contracting party. No rights can be acquired by such an act of violence. All the books agree that a man may avoid his deed for duress of imprisonment. Some of the cases hold that the deed may be avoided although the imprisonment was under legal process. In *Watkins v. Baird*, 6 Mass. R. 506, PARSONS, Ch. J. said: "It is a sound and correct principle of law that when a man shall falsely, maliciously, and without probable cause sue out a process in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested to obtain his deliverance, such deed may be avoided by duress of imprisonment; for such imprisonment is

tortious and unlawful as to the party procuring it, and he is answerable in damages for the tort in an action for a malicious prosecution, the suing of legal process being an abuse of the law and a proceeding to cover the fraud." And so the matter was adjudged by the whole Court. The case before Chief Justice BRIDGMAN at Guild-Hall, 1 Lev. 68, 9, where a different doctrine was laid down, was entirely disregarded. The authority of that case was also denied in *Richardson v. Duncan*, 3 N. Hamp. R. 508, where it was held that an arrest for a just cause and under lawful authority, if it be made for unlawful purposes, may be construed a duress so as to avoid a contract which the party made for his deliverance. And to the same effect is Buller's N. P. 172; 2 Inst. 482; Com. Dig. Pleader, 2 W. 19; Vin. Ab. Duress, B. pl. 25; *Inhab. of Whitefield v. Longfellow*, 13 Maine R. 146. But in the view we are now taking of the case the imprisonment was unlawful, and there never was a doubt that a contract obtained by such means might be avoided.

As the evidence left it doubtful whether the plaintiff was actually imprisoned, the Judge also instructed the jury as to what would constitute a case of duress *per minas*; and here it is strenuously insisted that he fell into an error. It is said there must be a threat of life or limb, or of mayhem; and that a man cannot avoid his contract on the ground that it was procured through the fear of illegal imprisonment. But LORD COKE says the fear of imprisonment is enough: 2 Inst. 483; Co. Litt. 253 b. And so the rule has been understood ever since that time: Vin. Ab. Duress, B. pl. 23; Com. Dig. Pleader, 2 W. 20; Bac. Ab. Duress, A.; Chitty on Contr. 168, ed. of '39; *Inhab. of Whitefield v. Longfellow*, 13 Maine R. 146; *Eddy v. Herrin*, 17 Id. 338; I Cowen's Tr. 264. It is true that BLACKSTONE, in speaking of duress *per minas*: 1 Com. 130, 1, does not mention the fear of imprisonment; but he was only stating the general doctrine, and he says nothing either way upon this point. I do not find that the rule as laid down by COKE has ever been denied.

If a deed might be avoided nearly three centuries ago on the ground that it was procured by threats and the fear of illegal imprisonment, there can be no room for doubt upon the ques-

tion at the present day. As civilization has advanced, the law has tended much more strongly than it formerly did to overthrow every thing which is built upon violence or fraud. In the time of COKE it was said that a man could not avoid his act on the ground that it was procured by the fear of battery, burning his house, taking away or destroying his goods, or the like; for there he may have satisfaction by the recovery of damages: 2 Inst. 483. But Mr. CHITTY very justly doubts whether such be the rule at the present day, especially in regard to so serious an injury as a threat to burn a man's house: Chit. on Contr. 169, ed. of '39. In *Sumner v. Ferryman*, 11 Mod. 201, POWELL, J., said a man cannot avoid his bond by duress to his goods, but only to his person. (And see *Astley v. Reynolds*, 2 Str. 915.) But in South Carolina it has been held that duress of goods will under some circumstances avoid a man's contract: *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Id. 211; and see *Nelson v. Suddarth*, 1 Hen. & Munf. 350. I do not intend to say that a man can avoid his bond on the ground that it was procured by an illegal distress of goods; but I entertain no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress. There is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrong-doer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction.

Under the charge of the Judge and the finding of the jury, the pretended settlement was a void act, and the defendant acquired no title to the cattle. The plaintiff might have retaken the property the next moment if he could have done it without a breach of the peace. No demand before bringing suit was necessary. The defendant was a trespasser when he drove away the cattle: *Carey v. Hotaling*, 1 Hill, 311, and cases cited. That was a case of the sale and delivery of goods procured by fraud, and it was held that trespass, or replevin in the *cepit*, would lie. Although the owner voluntarily consented to part with the property, the consent was nullified by the fraud through which it was induced. Here the plaintiff never con-

sented to part with his property. It is the same thing as though the defendant had gone into the drove without a shadow of authority and taken the ten head of cattle.

The remaining part of the charge was sufficiently favorable to the defendant. The jury must have found either that none of the defendant's cattle were in the drove, or that the defendant abandoned the two yearlings which he claimed as absolutely worthless ; otherwise their verdict, following the charge, would have been the other way. There is no evidence in the case that the leaving of the two yearlings with the plaintiff formed any part of the consideration for the settlement, and the defendant had said they looked so meager that he did not wish to take them.

If the defendant in fact owned the two yearlings which he claimed, and they had been left with the plaintiff as a part of the consideration for the settlement, I should not have thought it entirely clear that the plaintiff must offer to restore them before bringing suit. One who obtains goods by fraud or violence cannot make a good title by showing that he paid a part of the value of the property. When treated as a wrong-doer, the most that he can ask is to have the payment considered in the assessment of damages. But this question is not necessarily in the case.

On the whole, we think the charge was substantially correct. Whether the jury were right upon any or all of the questions submitted by the Judge, is a matter which cannot be reviewed on a bill of exceptions.

New trial denied.

SMITH ON CONTRACTS, 236 and note.

Taylor v. Jaques, 106 Mass. 291 ; Tapley v. Tapley, 10 Minn. 448 ; Moore v. Adams, 8 Ohio St. 372 ; Bush v. Brown, 49 Ind. 573 ; Seymore v. Prescott, 69 Me. 376.

DEFINITION AND CLASSIFICATION OF DURESS.

BROWN v. PIERCE.

Supreme Court of the United States, 1868.

7 Wall. 205.

CLIFFORD, J. Representations of the complainant were, that on the 10th of August, 1857, he acquired a complete title to the premises described in the bill of complaint, under the pre-emption laws of the United States, and that thereafter, on the same day, he was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the principal respondent. Framed on that theory, the bill of complaint alleged that the first-named respondent was at that time a member of an unlawful association in that Territory, called the Omaha Claim Club, and that he, accompanied by three or four other persons belonging to that association, came to his house a few days before he perfected his right of pre-emption to the land in question, and told the complainant that if he entered the land under his pre-emption claim, he must agree to deed the same to him, and added, that unless he did so, he, the said respondent and his associates, would take his life; and the complainant further alleged that the same respondent, accompanied, as before, by certain other members of that association, came again to his house on the day he perfected his pre-emption claim, and repeated those threats of personal violence, and did other acts to intimidate him, and induce him to believe that they would carry out their threats if he refused to execute the deed as required.

Based upon those allegations, the charge is that the complainant was put in duress by those threats and acts of intimidation, and that he signed and executed the deed, and conveyed the land by means of those threats and certain acts of intimidation, and through fear of his life, and without any consideration; and he prayed the Court that the conveyance might be

decreed to be inoperative and void, and that the grantee might be required to reconvey the same to the complainant.

Two other persons were made respondents, as claiming some interest in the land in controversy. Pierce, the principal respondent, and Weston, one of the other respondents, were non-residents, and were served by publication pursuant to the rules of the Court and the law of the jurisdiction. They never appeared, and failing to plead, answer, or demur, and due proof of publication in the manner prescribed by law having been filed in Court, a decree was rendered as to them, that the bill of complaint be taken as confessed: *Nations et al. v. Johnson et al.*, 24 Howard, 201.

Morton, the other respondent, appeared and filed an answer, in which he alleged that the principal respondent, on the twenty-eighth of August, 1857, and for a long time before, was the owner in fee of the premises; that he was informed, and believed, that the complainant entered upon the land as the tenant of the principal respondent, and that he was prosecuting this suit in violation of the just rights of all the respondents; that the principal respondent wanting to borrow money, he, the respondent before the Court, loaned him a large sum, and accepted bills of exchange for the payment of the same, drawn to the order of the borrower of the money, and which were indorsed by the drawer; that the bills of exchange not having been paid when they became due, he brought suit against the drawer and indorser, and recovered judgment against him for three thousand one hundred dollars; that the judgment so recovered is in full force and unsatisfied, and that the same is a lien on the premises described in the bill of complaint.

No answer, from any knowledge possessed by the respondent, is made to the allegation that the complainant acquired a complete title to the land under the pre-emption laws of the United States, nor to the charge contained in the bill of complaint, that the deed was procured by threats of personal violence amounting to actual duress. On the contrary, the answer alleged that the respondent before the Court was an utter stranger to all those matters and things, and that he could not answer concerning the same, because he had no information or belief upon the subject.

Authorities are not wanting to the effect that all matters well alleged in the bill of complaint, which the answer neither denies nor avoids, are admitted; but the better opinion is the other way, as the sixty-first rule adopted by this Court provides that if no exception thereto shall be filed within the period therein prescribed, the answer shall be deemed and taken to be sufficient: *Young v. Grundy*, 6 Cranch, 51; *Brooks v. Byam*, 1 Story, 297.

Material allegations in the bill of complaint ought to be answered and admitted, or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts, or waive that branch of the controversy; but the clear weight of authority is, that a mere statement by the respondent in his answer, as in this case, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact: *Warfield v. Gambrill*, 1 Gill & Johnson, 503.

Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defence, and the well-known omissions and defects of such an answer may have some tendency to prove the allegations of the bill of complaint, but they are not such an admission of the same as will constitute a sufficient foundation for a decree upon the merits: *Young v. Grundy*, 6 Cranch, 51; *Parkman v. Welch*, 19 Pickering, 234.

Proper remedy for a complainant, in such a case, is to except to the answer for insufficiency within the period prescribed by the sixty-first rule; but if he does not avail himself of that right, the answer is deemed sufficient to prevent the bill from being taken *pro confesso*, as it may be if no answer is filed: *Hardeman v. Harris*, 7 Howard, 726; *Stockton v. Ford*, 11 Id. 232; 1 Daniel's Chancery Practice, 736; *Langdon v. Goddard*, 3 Story, 13.

Attention is called to the fact that no replication was filed to the answer; but the suggestion comes too late, as the respon-

dent proceeded to final hearing in the Court below without interposing any such objection.

Mere formal defects in the proceedings, not objected to in the Court of original jurisdiction, cannot be assigned in an appellate tribunal as error to reverse either a judgment at law or decree in equity.

Legal effect of a replication is, that it puts in issue all the matters well alleged in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged: 1 Barbour's Chancery Practice, 249; *Mills v. Pitman*, 1 Paige's Chancery, 490; *Peirce v. West*, 1 Peter's Circuit Court, 351; Story's Equity Pleading, 878; Cooper's do., 329.

Undenied as the answer is by any replication, it must have its fair scope as an admission; but the Court is not authorized to supply anything not expressed in it, beyond what is reasonably implied from the language employed. Proofs were taken by the complainant, and they show, to the entire satisfaction of the Court, that all the matters alleged in the bill of complaint, and not denied in the answer, are true, and the conclusion of the Court below was, that the complainant acquired a complete title to the land under his pre-emption claim, and that the deed from him to the principal respondent was procured in the manner and by the means alleged in the bill of complaint.

Nothing is exhibited in the record to support any different conclusion, or to warrant any different decree, unless it be found in one or the other of the first two defences set up in the answer.

First defence is, that the principal respondent, on the twenty-eighth of August, 1857, and long before that time, was the owner in fee of the premises; but neither that part of the answer, nor any other, denied that the complainant acquired a complete title to the land, as alleged in the bill of complaint, nor set up any defence in avoidance of those allegations, nor made any attempt to present any defence against the direct charge, that the deed under which the respondent claimed title was procured from the complainant through threats of personal violence and by means of duress. Indefinite as the allegation of title is, the answer must be construed as referring to the

title under the deed in controversy, as it is not pretended that the respondent ever had any other, and, if viewed in that light, it is in no respect inconsistent with the conclusion adopted by the Supreme Court of the Territory.

Such an indefinite allegation cannot be considered as presenting any sufficient answer, either to the alleged title of the complainant or to the charge made in the bill of complaint.

Briefly stated, the second defence set up in the answer is, that the respondent was informed and believed that the complainant entered upon the land as a tenant, but the time when the supposed entry was made is not alleged, nor are the circumstances attending the entry set forth, nor is any reason assigned why the allegations were not made more definite, nor is there any fact or circumstance alleged which shows or tends to show that there was any prior owner to the land, except the United States, nor that the respondent ever pretended to have any other title to the same than that derived from the complainant.

Viewed in any light, those allegations must be regarded as evasive and insufficient; and they are not helped by the omission of the complainant to file the general replication. Those parts of the answer being laid out of the case as insufficient to constitute a defence, the conclusion is inevitable that the title to the land was in the complainant as alleged, and that he parted with it through threats of personal violence and by duress, and without any consideration.

Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent. Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient in law to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

Duress, in its more extended sense, means that degree of

constraint or danger,- either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness: Chitty on Contracts, 217; 2 Greenleaf on Evidence, 283.

Text-writers usually divide the subject into two classes, namely, duress *per minas* and duress of imprisonment, and that classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English Courts to the present time: 2 Institutes, 482; 2 Rolle's Abridgment, 124.

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received: Richardson v. Duncan, 3 New Hampshire, 508; Watkins v. Baird, 6 Massachusetts, 511; Strong v. Grannis, 26 Barbour, 124.

Second class, duress *per minas*, as defined at common law, is where the party enters into a contract (1) for fear of loss of life; (2) for fear of loss of limb; (3) for fear of mayhem; (4) for fear of imprisonment; and many modern decisions of the Courts of that country still restrict the operations of the rule within those limits: 3 Bacon's Abridgment, title "Duress," 252.

They deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned for this qualification of the rule is, that such threats are not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in a suit at law.

Cases to the same effect may be found also in the reports of decisions in this country, and some of our text-writers have adopted the rule, that it is only where the threats uttered excite fear of death, or of great bodily harm, or unlawful

imprisonment, that a contract, so procured, can be avoided, because, as such Courts and authors say, the person threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy: *Skeate v. Beale*, 11 Adolphus & Ellis, 983; *Atlee v. Backhouse*, 3 Meeson & Welsby, 642; *Smith v. Monteith*, 13 Id. 438; *Shepherd's Touchstone*, 6; 1 *Parsons on Contracts*, 393.

On the other hand there are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance: *Foshay v. Ferguson*, 5 Hill, 158; *Central Bank v. Copeland*, 18 Maryland, 317; *Eadie v. Slimmon*, 26 New York, 12; 1 *Story's Equity Jurisprudence* (9th ed.), 239; *Harmony v. Bingham*, 12 New York, 99; s. c., 1 Duer, 229; *Fleetwood v. New York*, 2 Sanford, 475; *Tutt v. Ide*, 3 Blatchford, 250; *Astley v. Reynolds*, 2 Strange, 915; *Brown v. Peck*, 2 Wisconsin, 277; *Oates v. Hudson*, 5 English Law and Equity, 469.

But the case under consideration presents no question for decision which requires the Court to determine which class of those cases is correct, as they all agree in the rule that a contract procured through fear of loss of life, produced by the threats of the other party to the contract, wants the essential element of consent, and that it may be avoided for duress, which is sufficient to dispose of the present controversy: 2 *Greenleaf on Evidence*, 283; 1 *Blackstone's Commentaries*, 131.

Next question which arises in the case is, whether the judgment set up by the appellant creates a superior equity in his favor over that alleged and proved by the appellee.

Before proceeding to examine this question, it will be useful to advert briefly to the material facts exhibited in the record.

Title was acquired by the complainant under the pre-emption laws of the United States, and on the same day the principal respondent, through threats to take his life if he refused, compelled him to convey the same to that respondent, and the

record shows that the respondent before the Court, within the same months, loaned the money to the grantee in that deed, for which he recovered judgment, although the grantor was then in possession of the land, and has remained in possession of the same to the present time.

The judgment is founded upon the bills of exchange received for that loan. Judgments were not liens at common law, but several of the States had passed laws to that effect before the judicial system of the United States was organized, and the decisions of this Court have established the doctrine that Congress, in adopting the processes of the States, also adopted the modes of process prevailing at that date in the Courts of the several States, in respect to the lien of judgment within the limits of their respective jurisdictions: *Williams v. Benedict et al.*, 8 Howard, 111; *Ward et al. v. Chamberlain et al.*, 2 Black, 438; *Bayard v. Lombard*, 9 Howard, 530; *Riggs v. Johnson County*, 6 Wallace, 166.

Different regulations, however, prevailed in different States, and in some neither a judgment nor a decree for the payment of money, except in cases of attachment or *mesne* process, created any preference in favor of the creditor until the execution was issued, and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself: *Conard v. Atlantic Ins. Co.*, 1 Peters, 443; *Massingill v. Downs*, 7 Howard, 767.

Such judgments and decrees were made liens by the process acts in the Federal districts where they have that effect under the State laws, and Congress has since provided that they shall cease to have that operation in the same manner, and at the same periods, in the respective Federal districts, as like processes do when issued from the State Courts. Federal judgments and decrees are liens, therefore, in all cases and to the same extent, as similar judgments and decrees are when rendered in the Courts of the State.

Express decision of this Court is, that the lien of a judgment constitutes no property in the land, that it is merely a general lien securing a preference over subsequently acquired interests

in the property, but the settled rule in Chancery is, that a general lien is controlled in such Courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof.

Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights: *Drake on Attachments*, § 223.

Correct statement of the rule is, that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person: *Howe*, petitioner, 1 Paige's Chancery, 128; *Ellis v. Tousley*, Ib. 283; *White v. Carpenter*, 2 Paige, 219; *Buchan v. Sumner*, 2 Barbour's Chancery, 181; *Lounsbury v. Purdy*, 11 Barbour, 494; *Keirsted v. Avery*, 4 Paige's Chancery, 15.

Guided by these considerations; the Court of Chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered: *Averill v. Loucks*, 6 Barbour, 27.

Objection is also made, that the affidavitt showing that the defendants were non-residents was not in due form, and that the order of notice, and the publication of the same, were insufficient to give the Court jurisdiction; but the proposition is not supported by the record, and must be overruled.

Decree affirmed.

DURESS BY IMPRISONMENT.

A contract made with a party *lawfully* imprisoned, in good faith, and without oppression, cannot be avoided on the ground of duress.

EDDY *v.* HERRIN.

Supreme Judicial Court of Maine, 1840.

17 Me. 338.

WESTON, C. J. The plaintiff having a claim upon the principal defendant for an injury done to his person, the parties agreed to refer the matter to the arbitration of others, upon whose award, subsequently partially modified by mutual consent, the note in question was given. This constituted a sufficient consideration; and the plaintiff is entitled to recover, unless the defence of duress, set up by the defendants, has been sustained. The burden of proof is upon them.

The plaintiff had made a complaint against the principal defendant, and had procured a warrant for his arrest to answer to the charge. This he had a right to do; and if the defendant had been thereupon arrested, the imprisonment or restraint of his person would have been lawful; and a lawful imprisonment is no duress. The referees have found that no arrest was made. The defendant was given to understand that he would be arrested unless the parties effected a settlement. With a view to this they went to Skowhegan-falls. The officer testifies that he would not have suffered him to have escaped. By which we are to understand that if he had attempted to do so he should have arrested him. This was no more than the precept of the warrant and his duty required. The referees further find that the fear of the prosecution of the warrant, or in other words an arrest under it, induced the principal defendant to enter into the arbitration, and also to accede to the final proposition of the plaintiff to accept a note for a less sum than was awarded in his favor, with the defendant's father as a surety.

The prosecution of the warrant, and the arrest as incident to it, were a lawful course of proceeding. The threat, therefore, of such an arrest, and the fact that the defendant was induced by it to give the note, did not constitute duress, as it would have done if he had acted from the fear of unlawful imprisonment: *Whitefield v. Longfellow et al.*, 13 Maine R. 146. In our judgment, therefore, the defence of duress, which is submitted to the determination of the Court, has not been made out. The exceptions are accordingly sustained, and the plaintiff is entitled to judgment on the report.

Taylor v. Cottrell, 16 Ill. 93; *Kelly v. Noyes*, 43 N. H. 209; *Wilcox v. Howland*, 23 Pick. 167; *Soul v. Bonney*, 37 Me. 128; *Smith v. Atwood*, 14 Ga. 402; *Feton v. Gregory*, 130 Mass. 176; *Pichard v. Sharp*, 51 Mich. 432.

To constitute duress by imprisonment the *original restraint or detention* must have been *unlawful*, or there must have been an *abuse of legal process*: *Crowell v. Gleason*, 10 Me. 325.

But a contract into which a person has been induced to enter through unlawful imprisonment may be avoided on the ground of duress.

SCHOMMER v. FARWELL *et al.*

Supreme Court of Illinois, 1869.

56 Ill. 542.

LAWRENCE, J. This was a bill in chancery, filed by Leonard Schommer against John V. and Charles B. Farwell, to set aside a mortgage given by complainant to them under the following circumstances: It appears the Farwells employed a son of Schommer, a youth of sixteen, to keep an account of the loads of sand taken from a piece of land near Chicago belonging to them, and to collect the money for each load. They became suspicious that the boy was defrauding them by not making honest returns, and gave the matter in charge to one Keefe, a professional detective in the employment of the Farwells. He investigated the matter, and becoming satisfied the boy was practising a fraud, and doubtless supposing his father was privy to it, procured a warrant from a magistrate and had the father arrested.

The arrest was made in the evening, about the last of October, 1867. Schommer was at once taken to jail and placed in a cell without fire or a bed, where, as he testifies, he suffered greatly from cold during the night, being at the time in feeble health. In the morning he was taken from the cell up stairs, where he was confronted with Keefe, who charged him with being engaged, with his boy, in embezzling the money for the sand to a large amount, and, according to Keefe's own testimony, offered to have the prosecution stopped if Schommer would pay over the money. Schommer denied the charge and Keefe went away. Schommer was put back in the cell. About noon Keefe appeared again at the police station, and Schommer was again brought from his cell to meet him. Another conversation ensued, the result of which was that Schommer agreed to pay the Farwells \$300 in money, and give a mortgage on his property for \$900, if he could be released. An officer was then sent with him to his house, and, the money having been paid and the mortgage executed, he was released from custody. Keefe testifies Schommer in the second conversation admitted the embezzlement by him of \$1200, and that he owed the Farwells that amount. The bill in this case is filed for the purpose of cancelling the mortgage and recovering back the money paid.

It is quite true, as urged by counsel for appellees, that a person prosecuting upon a charge of crime may receive private satisfaction for his private injury, and the fact that he receives this while the prisoner is in confinement, and forbears further prosecution, does not of itself render the transaction illegal. This was so held in *Taylor v. Cottrell*, 16 Ill. 93. But as was said by PARSONS, C. J., in *Watkins v. Baird*, 6 Mass. 506, even if the imprisonment is lawful, yet if the prosecutor detain the prisoner in prison unlawfully, by covin with the jailor, that is a duress which will avoid a deed. There can be no doubt of the correctness of this principle, and it is applicable to the case at bar. Schommer swears he was told while in confinement that he could have neither lawyer nor trial, but must pay his debts. His testimony is, of course, to be received with caution, but Keefe himself testifies Schommer said he wanted to be tried, and was willing to go down and have his trial. There

is no pretence that his examination before the magistrate who issued the warrant was delayed for the purpose of procuring testimony. Keefe himself was the witness on whose evidence the prosecution would have rested. When, therefore, Schommer demanded to be taken before the magistrate he should have been taken there. Instead of this the jailor, after the first ineffectual interview between Schommer and Keefe, re-commits Schommer to his cell until Keefe again appears, and Schommer, under the apprehension of further incarceration, accedes to Keefe's demands. He is then discharged without having been taken before the magistrate who issued the warrant at all.

It is evident that the sole purpose of Keefe in this prosecution was, by the agencies of the criminal law, to secure what he believed to be a debt due to his employers. The police officers seem to have paid no attention to the command of the magistrate's warrant, or to the rights of the prisoner, but to have used their official power merely in obedience to the wishes of Keefe, and to enable him to accomplish his private purpose. We presume Keefe believed Schommer's son had been guilty of embezzlement, and that the father was privy to it, but this did not justify him in prolonging the imprisonment of Schommer a single hour, merely for the purpose of compelling the execution of this mortgage, and if it was executed by Schommer as the only means of speedily terminating his confinement, and after being refused a hearing before the magistrate, then it was executed under duress and is void. That it was so executed is fairly to be inferred from the testimony.

The majority of the Court are of opinion the complainant is entitled to have the mortgage cancelled and the money paid refunded, with interest, and the Superior Court will make a decree to this effect. The decree is reversed, and the cause remanded.

Decree reversed.

Bowker v. Lowell et al., 49 Me. 429.

A contract procured by an arrest or imprisonment under a void judicial process may be avoided on the ground of duress.

GUILLEAUME *v.* ROWE *et al.*

Court of Appeals, New York, 1883.

94 N. Y. 268.

Where a person, under arrest of a void process, contracted not to sue the party procuring it, if he was released, *Held*, that such contract was voidable on the ground of duress.

DANFORTH, J. Upon this appeal the defendants must be held to the point on which they succeeded at the trial term. They then conceded that the arrest of the plaintiff was by virtue of an execution for which there was no authority in law, but had him turned out of Court on the sole ground that there was no evidence showing that either of the defendants authorized the issuing of the execution or his arrest. The General Term were of opinion that a case was made out by the plaintiff, and we agree with that Court. A party is bound by the acts of his attorney, although he does not give immediate direction as to the proceedings in an action, or is not with him at its successive stages. If he sets the attorney in motion, he becomes liable as the cause progresses, and if the result is in his favor, is responsible for the methods resorted to for the enforcement of the judgment. This is well settled: *Barker v. Braham*, 3 Wils. 368; *Poucher v. Blanchard*, 86 N. Y. 256. Here the retainer of the attorney was by these defendants, the issuing of the execution was within the scope of his implied authority, and the arrest of the judgment debtor was for the purpose of compelling payment. This was enough to make them liable. There was, however, evidence tending to show actual knowledge on the part of the defendants, and at any rate acquiescence by them in the course adopted by their attorney. The Court erred in taking the question from the jury and in dismissing the case as one where no cause of action was made out.

The learned counsel for the appellants now argues that by the stipulation the plaintiff released his right of action. But this proposition was decided against the defendant by the trial Judge as well as the General Term. It has no merit. The instrument on which he relies was executed by the plaintiff without consideration and while enduring an imprisonment, which was illegal. It was, therefore, void for duress: *Foshay v. Ferguson*, 5 Hill, 154; *Evans v. Begleys*, 2 Wend. 243; and the defendants could acquire no right under it.

The General Term properly reversed the judgment and directed a new trial. Its order should be affirmed and, by reason of the defendant's stipulation, the plaintiff have judgment absolute.

All concur.

Order affirmed, and judgment accordingly.

Alexander v. Pierce, 10 N. H. 494; *Fisher v. Shattuck*, 17 Pick. 252; *Davis v. Luster*, 64 Miss. 43.

Where the imprisonment is lawful *in form*, but procured *falsely* and *without probable cause*, then the contract secured thereby can be avoided on the ground of duress.

WATKINS v. BAIRD.

Supreme Judicial Court of Mass., 1810.

6 Mass. 506.

PARSONS, C. J. It is a general rule that imprisonment by order of law is not duress; but to constitute duress by imprisonment, either the imprisonment or the duress after must be tortious and unlawful: 2 Inst. 482. If therefore a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action: Vid. Hob. & Lev. *ubi supra*.

And although the imprisonment be lawful, yet unless the deed be made freely and voluntarily, it may be avoided by duress : 43 E. 3 10 b. pl. 32. And if the imprisonment be originally lawful, yet if the party obtaining the deed detain the prisoner in prison unlawfully, by covin with the gaoler, this is a duress which will avoid the deed : Cro. Jac. 187, *Huscombe v. Standing*. But when the imprisonment is unlawful, although by color of legal process, yet a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided by duress of imprisonment. In *Allen*, 92, debt was sued on a bond, and duress of imprisonment pleaded in bar. The plaintiff had, on charging the defendant with felony in stealing a horse, procured a warrant from a justice, on which the defendant was arrested and imprisoned, and sealed the bond to the plaintiff to obtain his discharge, which was done, the horse appearing to be his own horse. *ROLL, J.*, directed the jury that the proceedings being had to cover the deceit, the bond was obtained by duress.

And in our opinion it is a sound and correct principle of law when a man shall falsely, maliciously, and without probable cause sue out a process in form regular and legal to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may be avoided by duress of imprisonment. For such imprisonment is tortious and unlawful as to the party procuring it ; and he is answerable in damages for the tort, in an action for a false and malicious prosecution ; the suing of legal process being an abuse of the law and a proceeding to cover the fraud. And although *Bridgman*, in *Lev.* 68, 9, is made to say that imprisonment in custody of law by the king's writ will not be duress to avoid a deed, when the arrest is without cause of action, because the party has his remedy by action of the case ; yet this must be a mistake, as there is no remedy by action for suing a groundless suit unless the suit be without probable cause and malicious. And if it be, certainly the imprisonment is wrongful as to the party who maliciously procured it.

Now on examining the facts reported by the Judge in the case at bar, it is apparent that the suit on which the plaintiff was imprisoned was without probable cause, there being indeed

no color for it. And the evidence was sufficient for the jury to infer that the suit was also malicious. The plaintiff was wickedly and by false pretences decoyed from his home in the State of New York into this county. Here he was immediately arrested at the defendant's suit, who had no cause of action against him, the present action being then pending. And the object of the release was to bar this action.

Upon the whole the oppression was gross and flagrant, and it would be a reproach to the law if it would allow to this release, thus unjustly and fraudulently obtained, any legal effect against the plaintiff, so injuriously and dishonorably treated. The direction of the Judge appears to be correct, and in our opinion the plaintiff ought to have judgment.

Let judgment be entered on the verdict.

Any contract secured by means of criminal proceedings instituted for the purpose of enforcing civil rights is invalid.

SEIBER v. PIERCE.

Supreme Court of Michigan, 1873.

26 Mich. 518.

GRAVES, J. This was a suit by defendant in error, on a covenant set out in the declaration, and the first objection is, that a breach is not assigned.

The plaintiff in error contends that his covenant was in the alternative, and that he had the right either to collect the Eaton notes of Brooks, and pay over the agreed sum from the proceeds on or before July 1, 1868, or after the latter date to pay the same sum from his own means, and that the averment of non-payment after July first did not negative performance through collection of Brooks, and payment out of such collection, but merely negatived the second alternative.

This objection is thought to be untenable. The stipulation as to proceeding against Brooks was for the sole benefit of Seiber, and merely intended to give him time and opportunity

to make the money out of the notes, and it had no other consequence as against Price, who was entitled to the specified amount in any event, than to postpone his right to call on Seiber till the expiration of the time given for the collection. Seiber was absolutely bound to pay the amount whether he collected the notes or not, and Price was fully entitled to the amount after July first. The averment indicates that payment had not been made at all. The breach, it is true, is not assigned with technical nicety, but it is to be regarded as sufficient after verdict. The plaintiff in error chose not to demur, and he ought not, after taking the chance of a trial of the fact, to be allowed to turn the defendant in error round upon an objection which, in so far as it has any merit, is one rather of form than of substance.

The only other objection deserving notice is, that the jury were not allowed to pass upon testimony bearing upon the question of illegal obtainment of the covenant.

The record manifests that evidence was adduced having tendency to show that Seiber was arrested in Detroit and taken to Pontiac on a charge made against him by Price for false pretences. That while he was before the justice on that charge, he gave the covenant in settlement of the transaction out of which grew the very criminal accusation on which he was under arrest, and that he was then immediately discharged. He himself testified that he was told at the time, by some one, that if he did not settle they would take him to Jackson.

His counsel, in substance, solicited a charge that if the covenant was given to stifle the criminal prosecution, or if the arrest and imprisonment were caused merely with a view to compel settlement, and, in answer to this design, the covenant was made by Seiber to free himself from the arrest, the covenant was void. These requests, as made to the Court, were not clearly framed, but we think they were entitled to be understood as asking what we have indicated. They were, however, not only refused, but the jury were in effect told to find for Price. What view the jury might or ought to have taken of this evidence, we cannot decide. But I think they were entitled to pass upon it, and that Seiber had the legal right to claim that they should do so. If he had committed a

criminal fraud on Price, the latter had a right to have him prosecuted therefor. If Price had a civil cause of action, he was authorized to bring a civil suit for it. So, too, he was entitled to take security. But he had no right to employ a criminal process to collect or enforce his private civil demands. An arrest by legal warrant on a criminal charge to compel the satisfaction of a mere private civil demand is a misuse of process, a fraud upon the law, and an illegal arrest as respects the party who knowingly and purposely perverts the machinery of the law in that way. And papers obtained under the pressure of such a proceeding by the party promoting it are at least voidable as against him at the election of the party thus constrained to make them. It was a question of fact in this case upon the evidence whether the covenant was extorted by the pressure of the criminal prosecution. We cannot say upon the record that it certainly was not.

If the stopping of the prosecution was understood as entering into or forming any part of the consideration of the covenant, or if Price resorted to the criminal prosecution to obtain civil redress, and accordingly did, by means of the pressure of such prosecution, obtain it in the shape of the covenant, or if Price made the criminal prosecution a handle for getting the covenant, and thereupon Seiber gave the paper as a measure to exonerate himself from the proceeding so used against him, and would not have given it otherwise, it was enough certainly to invalidate the instrument as between the parties at Seiber's election. Upon this subject the jury have had no chance to speak, and we think on that account there ought to be another trial.

The judgment must, therefore, be reversed, with costs, and a new trial ordered.

Meek v. Atkinson, 1 Bailey, 84 ; Bame v. Detrick, 52 Ill. 19 ; Richardson v. Duncan, 3 N. H. 508 ; Shall v. Spooner, 9 Id. 197 ; Hacket v. King, 6 Allen, 58.

DURESS PER MINAS.

Duress may consist of *threats* to imprison or do violence to the party, and must be such as to constitute an impending danger to life or of serious bodily harm sufficient to overcome the will of a man of ordinary firmness.

HARMON v. HARMON.

Supreme Judicial Court of Maine, 1873.

61 Me. 227.

DANFORTH, J. No question is raised in this case except under the second count in the writ, which is for money paid under an alleged duress arising from threats of a criminal prosecution and personal injury. The first instruction excepted to is that a threat of prosecution does not constitute duress. In this we see no error. BACON, in his Abridgment, Vol. 2. p. 156, referring to LORD COKE, says: "That for menaces, in four instances, a man may avoid his own act. 1. For fear of loss of life; 2. Of loss of member; 3. Of mayhem; 4. Of imprisonment." A prosecution cannot come under either of the items of personal violence: unless, therefore, it implies imprisonment it cannot constitute duress. All the cases to which our attention has been directed, or which after considerable research we have been able to find, hold threats of prosecution sufficient to avoid an act only as they are connected with threats of imprisonment, either illegal in its beginning, or which by abuse becomes illegal. There must be imprisonment, or a fear of it, sufficient to overcome the will of a man of ordinary firmness and constancy. COKE says it is the fear of imprisonment "that sufficeth to avoid a bond or a deed." In *Whitefield v. Longfellow*, 13 Maine, 146, and *Eddy v. Herrin*, 17 Id. 338, it is held that there must be an unlawful imprisonment or a reasonable fear of it. In both of these cases a warrant for the arrest of the threatened party had been procured.

To the same effect is 2 Kent's Com. 453 ; Story's Pl. 249, 250 ; 2 Greenleaf's Ev. § 301 and note ; 1 Parsons on Cont. 393, 394.

The two cases mainly relied upon in argument are clearly distinguishable from this. In *Foshay v. Ferguson*, 5 Hill, 154, the threat relied upon is that of arrest upon a real or pretended warrant, and not simply of prosecution. In *Taylor v. Jacques*, 106 Mass. 291, the threat was not only of a prosecution, but of an immediate imprisonment, and on a warrant alleged to have been already procured. In this last case the jury were instructed, substantially, that duress must be by unlawful imprisonment, or by threats of imprisonment, inducing a reasonably grounded fear of restraint of liberty. This instruction was held to be substantially correct, and the exceptions on this point were sustained only on the ground that the jury were subsequently told that an admission of indebtedness on the part of the defendant to the amount claimed, or to part of that amount, and a liability to indemnify the plaintiffs for damages he had caused them, for the balance, would repel the inference of duress, although indicated by the other facts in the case. This case cannot properly be cited as authority to show that anything short of illegal imprisonment, or a well-grounded fear of it, will constitute duress.

It should be observed that in the case at bar no instructions were given and none asked as to the effect of threats of imprisonment. If the case required such, the counsel should have asked them, and in the absence of such request exceptions will not be sustained unless the rule of law given is erroneous. Some of the testimony in the case may have a tendency to prove threats of imprisonment, but none connected with a prosecution, or growing out of a warrant already obtained or even threatened. There is in the case no allusion to any precept issued or to be issued. A threat of prosecution simply, before the commencement of any legal proceedings, does not necessarily include an arrest. It is no more than an assertion that the proper steps will be taken to institute a legal process, which may or may not result in an arrest of the person. And whether the process is to be initiated before a magistrate or the grand jury, the law so shields it by the oath of the complainant and witnesses, as well as the official oaths and responsibilities of the

magistrate and jurors, that the danger of imprisonment from such a threat is too remote and contingent to overcome the will of an innocent person of common firmness.

Another answer to this exception is that the instruction was not material. If from the testimony it can by any possibility be inferred that there were any threats of criminal prosecution, it does not appear that the plaintiff's will was overcome by them, but quite the contrary. According to his own testimony, if his will was overcome by anything other than a submission to a claim of an amount due, it was by the danger of personal injury, or rather the effect of the violence manifested upon his wife. It is true that an act done to relieve the wife from duress may be avoided, but this case is not put upon that ground. All the duress complained of is upon the plaintiff himself.

The second instruction complained of, that of threats of personal injury, seems to be abandoned in the argument. But if not, it is in accordance with all the authorities. It is true that the later authorities have somewhat modified the older, requiring a less degree of personal injury than formerly to justify a man in yielding for the time; still all hold that there must be an apparent danger of serious bodily harm: 1 Parsons on Cont. 393; 2 Greenleaf on Ev. § 301, and note.

Exceptions overruled.

Baker v. Morton, 12 Wall. 150.

A contract entered into under duress of goods actually under control of the party practising the duress may be avoided by the other party.

SPAIDS v. BARRETT et al.

Supreme Court of Illinois, 1870.

57 Ill. 289.

THORNTON, J. The question presented in this case, as to the sufficiency of the declaration, will be considered as on motion in arrest of judgment.

The demurrer was properly sustained to the second count. It is nothing more than a count in slander, based upon an alleged libellous affidavit, filed in a legal proceeding. Whatever is said or written in such proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it: 1 Hill. Torts, 344; *Warner v. Paine*, 2 Sandf. 195; *Garr v. Selden*, 4 Comst. 91.

The first count alleges that the plaintiff was a dealer in oysters, and doing a large and lucrative business, and was indebted to appellees for transportation, &c., in the sum of \$1000, which he was able and willing to pay, and that they, maliciously intending to injure him and deprive him of his business, procured Barrett, one of the appellees, to make an affidavit, and that he did make an affidavit that plaintiff was indebted to the express company in the sum of \$2996.30, for transportation, &c., and that he had fraudulently conveyed and assigned his property, and was about fraudulently to conceal, assign, or otherwise dispose of his property, so as to hinder and delay his creditors; and that appellees then filed said affidavit with the clerk of the Circuit Court of Cook County, and obtained a writ of attachment, and procured the levy thereof upon \$5000 worth of oysters, and deprived the plaintiff of possession, and neglected to take care of them; by reason whereof they became of no value.

The declaration further alleges that it was not true that the plaintiff had fraudulently conveyed or assigned, or intended to conceal and assign, his property, so as to hinder and delay his creditors; that he was not indebted in the amount mentioned in the affidavit, and that the same was false and fraudulent, and well known to be so by appellees; and that they, wickedly and maliciously intending to injure, and extort a large sum of money from him—nearly \$2000 more than was due upon a fair accounting—refused to permit the oysters to be delivered to him, except on the payment of the sum in the affidavit mentioned; and that he, under protest, and to save his property from utter ruin, paid the same, not knowing that the oysters had sustained serious injury, by reason of the carelessness of appellees.

To this count, the general issue and a special plea of release were filed.

To the special plea the plaintiff replied *non est factum*, and that the release was obtained by duress of property. A demurrer was interposed to the special replication, which was sustained, and the plaintiff abided.

Three questions are raised by the record, and in the argument: First, is the special replication a good defence? Second, is not the plaintiff restricted to his remedy on the attachment bond? Third, is the count bad, on motion in arrest, for omitting to aver the termination of the suit, and the want of probable cause?

Upon the first question the authorities differ. All promises made and contracts entered into, where there is duress of the person, may be avoided. The reason is, that the person is induced to do the act by restraint of his liberty, or menace of bodily harm. But it has been held that an agreement, made under duress of goods, is not void, and that the person thus circumstanced must exert himself and resist the compulsory influence when his property is in danger. We can not appreciate the difference. Liberty and life are justly dear to all men, and so is the exclusive right to possess, dispose of, and protect from destruction our property. We can not forget the fact that the desire for property is a strong and predominant characteristic of man in organized society. An act done, prompted by this desire to preserve, and impelled by fear of the destruction of goods, is not voluntary. It is an act of compulsion. In *Foshay v. Ferguson*, 5 Hill, 158, BRONSON, J., said: "I entertain no doubt that a contract procured by threats, or the destruction of property, may be avoided on the ground of duress. It wants the voluntary assent of the party to be bound by it. Why should the wrongdoer derive advantage from his tortious act?"

Consent is of the essence of all contracts. Without it there may be the shadow, but not the substance. Money paid, as the only means to recover the possession of property to which the party is entitled; or, money paid to obtain possession of goods, where wrongfully taken, may be recovered back: *Steph. Nisi Prius* 1, 358; *Chase v. Dwinal*, 7 Greenl. 134; *Oates v. Hudson*, 6 Exch. 346; *Nelson v. Suddarth*, 1 Hen. & Munf. 350. If money could be recovered back under the cir-

cumstances, why is not the release void? It was not obtained with the consent intended by the law. Property which required especial care had been, by fraud, perjury, and extortion, wrongfully taken; was of a perishable nature, and rapidly going to destruction. The party having possession refused to surrender on payment of the actual indebtedness, but demands more than double the sum due, and in addition thereto a release for all damages for the wrongful acts—for the malicious violation of right and law. It would be a scandal to a Court of justice if a release, given under such circumstances, could not be avoided. We think the special replication a good answer to the plea, and that the demurrer should have been overruled: *Nelson v. Suddarth*, 1 Hen. & Munf. 350; *Sasportas v. Jennings*, 1 Bay, S. C. 470; *Collins v. Westberry*, 2 Id. 211; *Bane v. Detrick*, 52 Ill. 19.

We entertain no doubt that an action on the case lies for maliciously suing out an attachment and seizing the goods of the debtor, even though there was at the time some indebtedness; when the indebtedness claimed exceeded the actual amount \$2000, the levy was grossly excessive, and the object was extortion and oppression, attempted to be sustained by fraud and perjury. The party injured is not restricted to a suit on the bond. In many cases the amount of the bond would not be sufficient to compensate for the wrong—the loss of property, the destruction of business, and deprivation of profits, and the injury to feelings and reputation. In case exemplary and vindictive damages were given, the bond would be no security. It is claimed that the attachment bond is similar to an injunction bond, and that the case of *Gorton v. Brown*, 27 Ill. 489, is in point. This Court did decide, in that case, that an action could not be maintained for maliciously suing out a writ of injunction, because the injunction bond was intended to indemnify the party for all damages, in case the injunction is dissolved. This Court has restricted the damages, in such case, to the judgment enjoined, and costs, and such damages as may be awarded by the Court, upon the dissolution of the injunction: *Roberts v. Fahs*, 36 Ill. 271. This, too, is the language of the statute. The condition in the attachment bond is entirely different. It provides for the payment of such dam-

ages as shall be awarded, "in any suit or suits which may hereafter be brought for wrongfully suing out the attachment." This evidently contemplates suits, in addition to a suit on the bond, for on that there could be but one suit. In the case in 27 Ill. (*supra*), the Court assigned, as one reason for its opinion, that only one authority could be found in the books to sustain such a suit for suing out a writ of injunction. For the action in this case there are numerous authorities: *Savage v. Brewer*, 16 Pick. 456; *Bump v. Betts*, 19 Wen. 421; *Donnel v. Jones*, 13 Ala. 490; *Ibid.* 17 Id. 689; *Lindsay v. Larned*, 17 Mass. 190; *Whipple v. Fuller*, 11 Conn. 582; *Tomlinson & Sperry v. Warner*, 9 Ohio, 103; *Weaver v. Page*, 6 California, 681.

We have decided that the attachment suit was not terminated by consent, and that the release was obtained by duress of property. The averment in the declaration is, that the money claimed in the writ of attachment was paid to save the property from total ruin. The payment of the money released the property from the levy, and ended the suit. This is equivalent to an averment of a termination of the proceedings in attachment. The omission of such averment is, however, cured by verdict: 1 Chit. Plead. 679; 3 Steph. *Nisi Prius*, 2279; *Skinner v. Gunton*, 1 Saund. 228; *Young v. Gregorie*, 3 Call, 891; *Wine v. Ware*, 1 Siderfin, 15.

The current of authorities in the American Courts is, that the averment of the want of probable cause is of the *gist* of this action. We do not, however, hold that the words—"without any reasonable or probable cause"—are indispensable. Language may be used having the same meaning; and if this necessary averment of the want of probable cause is included in the sense of the declaration, it should be held sufficient. The averments in the declaration in this case are, substantially, that appellees, wickedly and maliciously intending to injure and ruin appellant, and extort money from him, procured the making of an affidavit and the issuance of a writ of attachment; and that they knew that the statements in the affidavit were false. If these averments be true, there could not have been any probable cause for the proceeding in attachment and the seizure of the property of appellant. If wilful perjury was committed—and this is charged—then there was

no cause whatever for the prosecution. The averments in the declaration negative the existence of probable cause, and are equivalent to the positive assertion of a want of probable cause: *Savage v. Brewer*, 16 Pick. 456; *Maddox v. McGinnis*, 7 Monroe, 370; *Young v. Gregorie*, 3 Call, 386.

The averments in the declaration, and proofs offered, if they can be made, show a most iniquitous abuse of legal process to extort money; and Courts of justice had better be abolished if they can afford no redress for such oppression. The Court therefore erred in the rejection of the evidence offered. For the errors indicated, the judgment is reversed, and the cause remanded.

Judgment reversed.

Miller v. Miller, 68 Pa. St. 486; *Williams v. Williams*, 63 Md. 371; *Burr v. Burton*, 10 Ark. 214; *Adams v. Stringer*, 78 Ind. 175.

If a man execute a contract through fear of *unlawful* imprisonment, he may avoid it on the ground of duress.

WHITEFIELD v. LONGFELLOW.

Supreme Judicial Court of Maine, 1836.

13 Maine, 146.

WESTON, C. J. A lawful detention or imprisonment of the person does not constitute duress. The arrest or restraint of the principal defendant was warranted by law; and it does not appear to have been unreasonably extended. While before the magistrate, some time was taken up in endeavoring to negotiate an adjustment; and the magistrate might take a reasonable time to consider what it was proper for him to do. But if a man executes a bond for fear of imprisonment, that, is of unlawful imprisonment, he may avoid it on the ground of duress.

It appears from the testimony of the magistrate that the defendant offered to give bond for his appearance at Court with sureties, who were in his judgment adequate, but he doubted whether he could take a bond, and upon the officer's saying

that he could not, but that the defendant must settle or go to gaol, the justice, supposing he could not take a bond, took the defendant aside, and told him he had better settle than go to gaol. This was manifestly adopting the views of the officer, and calculated to produce an apprehension in his mind that, if he did not settle, he must be sent to gaol, although he was ready to give bond with adequate sureties for his appearance at Court.

Such an imprisonment would have been unlawful. He had a right to be liberated upon giving such a bond. And if he did not execute the bond in suit freely, but through fear of unlawful commitment, he acted under the influence of such moral compulsion as constitutes duress. We think the jury should have been so instructed; and that it may be considered as embraced in some of the requests made by the defendant's counsel.

There is much reason to believe from the whole testimony that the principal defendant acted freely, notwithstanding the misapprehension of the justice. The jury, however, have not passed upon the question, which is to be considered as having been legally at issue before them, whether he did act freely, or whether under the fear of unlawful imprisonment. The exceptions are therefore sustained, and a new trial granted, that it may be distinctly presented to a jury for their determination.

The thing which the party seeks to avoid must have been done by him through fear of the threatened arrest, otherwise there is no duress: *Flanigan v. City of Minneapolis*, 36 Minn. 406.

Fear of losing one's property in an action commenced to take it from him is not such duress as will avoid a note he gives to compromise the matter and dismiss the action, in the absence of oppression: *Perkins v. Trinka*, 30 Minn. 241.

A mere threat to withhold from a party a legal right, which he has an adequate remedy to enforce, is not in the eye of the law duress such as will avoid the execution of a contract.

HACKLEY v. HEADLEY.

Supreme Court of Michigan, 1881.

45 Mich. 569.

COOLEY, J. Headley sued Hackley & McGordon to recover compensation for cutting, hauling, and delivering in the Muskegon River a quantity of logs. The performance of the labor was not disputed, but the parties were not agreed as to the construction of the contract in some important particulars, and the amount to which Headley was entitled depended largely upon the determination of these differences. The defendants also claimed to have had a full and complete settlement with Headley, and produced his receipt in evidence thereof. Headley admitted the receipt, but insisted that it was given by him under duress, and the verdict which he obtained in the Circuit Court was in accordance with this claim.

L. The question in dispute respecting the construction of the contract concerns the scaling of the logs. The contract was in writing, and bore date August 20, 1874. Headley agreed thereby to cut on specified lands and deliver in the main Muskegon River the next spring 8,000,000 feet of logs. The logs were to be measured or scaled by a competent person to be selected by Hackley & McGordon, "and in accordance with the standard rules or scales in general use on Muskegon Lake and River," and the expense of scaling was to be mutually borne by the parties.

The dispute respecting the expense of scaling related only to the board of the scaler. Headley boarded him and claimed to recover one-half what it was worth. Defendants offered evidence that it was customary on the Muskegon River for jobbers to board the scalers at their own expense, but we are of

opinion that this was inadmissible. If under the contract with the scaler he was to be furnished his board, then the cost of the board was a part of the expense of scaling, and by the express terms of the contract was to be shared by the parties. If that was not the agreement with him, Headley could only look to the scaler himself for his pay.

This is a small matter, but the question what scale was to be the standard is one of considerable importance. The evidence tended to show that at the time the contract was entered into, scaling upon the river and lake was in accordance with the "Scribner rule," so called; but that the "Doyle rule" was in general use when the logs were cut and delivered, and Hackley & McGordon had the logs scaled by that. By the new rule the quantity would be so much less than by the one in prior use that the amount Headley would be entitled to receive would be less by some \$2000; and it was earnestly contended on behalf of Headley that the scale intended, as the one in general use, was the one in general use when the contract was entered into.

We are of opinion, however, that this is not the proper construction. The contract was for the performance of labor in the future, and as the scaling was to be done by third persons, and presumptively by those who were trained to the business, it would be expected they would perform their duties under such rules and according to such standards as were generally accepted at the time their services were called for. Indeed, such contracts might contemplate performance at times when it would scarcely be expected that scalers would be familiar with scales in use when they were made. It is true the time that was to elapse between the making of this contract and its performance would be but short, but if it had been many years the question of construction would have been the same; and if we could not suppose under such circumstances that the parties contemplated the scalers should govern their measurements by obsolete and perhaps now unknown rules, neither can we here. It is fair to infer that the existing scale was well known to the parties, and that if they intended to be governed by it at a time when it might have ceased to be used, they would have said so in explicit terms. In the ab-

sence of an agreement to that effect, we must suppose they intended their logs to be scaled as the logs of others would be at the place and time of scaling.

II. The question of duress on the part of Hackley & McGordon in obtaining the discharge remains. The paper reads as follows:

“MUSKEGON, MICH., August 3, 1875.

“Received from Hackley & McGordon their note for four thousand dollars, payable in thirty days, at First National Bank, Grand Rapids, which is in full for all claims of every kind and nature which I have against said Hackley & McGordon.

“Witness: THOMAS HUME.

JOHN HEADLEY.”

Headley's account of the circumstances under which this receipt was given is in substance as follows: On August 3, 1875, he went to Muskegon, the place of business of Hackley & McGordon, from his home in Kent County, for the purpose of collecting the balance which he claimed was due him under the contract. The amount he claimed was upwards of \$6200, estimating the logs by the Scribner scale. He had an interview with Hackley in the morning, who insisted that the estimate should be according to the Doyle scale, and who also claimed that he had made payments to others amounting to some \$1400, which Headley should allow. Headley did not admit these payments, and denied his liability for them if they had been made. Hackley told Headley to come in again in the afternoon, and when he did so Hackley said to him: “My figures show there is 4260 and odd dollars in round numbers your due, and I will just give you \$4000. I will give you our note for \$4000.” To this Headley replied: “I cannot take that; it is not right, and you know it. There is over \$2000 besides that belongs to me, and you know it.” Hackley replied: “That is the best I will do with you.” Headley said: “I cannot take that, Mr. Hackley,” and Hackley replied: “You do the next best thing you are a mind to. You can sue me if you please.” Headley then said: “I cannot afford to sue you, because I have got to have the money, and I cannot wait for it. If I fail to get the money to-day, I shall probably

be ruined financially, because I have made no other arrangement to get the money only on this particular matter." Finally he took the note and gave the receipt, because at the time he could do nothing better, and in the belief that he would be financially ruined unless he had immediately the money that was offered him, or paper by means of which the money might be obtained.

If this statement is correct, the defendants not only took a most unjust advantage of Headley, but they obtained a receipt which, to the extent that it assumed to discharge anything not honestly in dispute between the parties, and known by them to be owing to Headley beyond the sum received, was without consideration and ineffectual. But was it a receipt obtained by duress? That is the question which the record presents. The Circuit Judge was of opinion that, if the jury believed the statement of Headley, they would be justified in finding that duress existed, basing his opinion largely upon the opinion of this Court in *Vyne v. Glenn*, 41 Mich. 112.

Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It is commonly said to be of either the person or the goods of the party. Duress of the person is either by imprisonment or by threats, or by an exhibition of force which apparently cannot be resisted. It is not pretended that duress of the person existed in this case; it is if anything duress of goods, or at least of that nature, and properly enough classed with duress of goods. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.

The leading case involving duress of goods is *Astley v. Reynolds*, 2 Strange, 915. The plaintiff had pledged goods for £20, and when he offered to redeem them the pawnbroker refused to surrender them unless he was paid £10 for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been unlawfully demanded and taken. This, say the Court, "is a payment by compulsion;

the plaintiff might have such an immediate want of his goods that an action of trover would not do his business ; where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not ; we must take it he paid the money relying on his legal remedy to get it back again." The principle of this case was approved in *Smith v. Bromley*, Doug. 696, and also in *Ashmole v. Wainwright*, 2 Q. B. 837. The latter was a suit to recover back excessive charges paid to common carriers who refused, until payment was made, to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances: *Harmony v. Bingham*, 12 N. Y. 99. The case is like it of one having securities in his hands which he refuses to surrender until illegal commissions are paid: *Scholey v. Mumford*, 60 N. Y. 498. So if illegal tolls are demanded for passing a raft of lumber, and the owner pays them to liberate his raft, he may recover back what he pays: *Chase v. Dwinal*, 7 Me. 134. Other cases in support of the same principle are *Shaw v. Woodcock*, 7 B. & C. 73; *Nelson v. Suddarth*, 1 H. & Munf. 350; *White v. Heylman*, 34 Penn. St. 142; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211; *Crawford v. Cato*, 22 Ga. 594. So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action: *Chandler v. Sanger*, 114 Mass. 364. See *Spaids v. Barrett*, 57 Ill. 289. Nor is the principle confined to payments made to recover goods ; it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right ; for example, when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to: *Bates v. Insurance Co.*, 3 Johns. Cas. 238 ; or a creditor withholds his certificate from a bankrupt: *Smith v. Bromley*, Doug. 696. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it: *Beckwith v. Frisbie*, 32 Vt. 559 ; *Adams v. Reeves*, 68 N. C. 134 ; *Briggs v. Lewiston*, 29 Me. 472 ; *Grim v. School*

District, 57 Penn. St. 433; *First Nat. Bank v. Watkins*, 21 Mich. 483.

But where the party threatens nothing which he has not a legal right to perform, there is no duress: *Skeate v. Beale*, 11 Ad. & El. 983; *Preston v. Boston*, 12 Pick. 14. When, therefore, a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress: *Wilcox v. Howland*, 23 Pick. 167. Many other cases might be cited, but it is wholly unnecessary. We have examined all to which our attention has been directed, and none are more favorable to the plaintiff's case than those above referred to. Some of them are much less so, notably *Atlee v. Backhouse*, 3 M. & W. 633; *Hall v. Schultz*, 4 Johns. 240; *Silliman v. United States*, 101 U. S. 465.

In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money, and might be financially ruined in case he failed to obtain it. It is not pretended that *Hackley & McGordon* had done anything to bring *Headley* to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and, if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need.

The case of *Vyne v. Glenn*, 41 Mich. 112, differs essentially from this. There was not a simple withholding of moneys in that case. The decision was made upon facts found by referees, who reported that the settlement upon which the defendant relied was made at Chicago, which was a long distance from plaintiff's home and place of business; that the defendant forced the plaintiff into the settlement against his will, by taking advantage of his pecuniary necessities, by informing plaintiff that he had taken steps to stop the payment of money due to the plaintiff from other parties, and that he had stopped the payment of a part of such moneys; that defendant knew the necessities and financial embarrassments in which the plaintiff was involved, and knew that if he failed to get the money so due to him he would be ruined financially; that plaintiff consented to such settlement only in order to get the money due to him, as aforesaid, and the payment of which was stopped by defendant, and which he must have to save him from financial ruin. The report, therefore, showed the same financial embarrassment and the same great need of money which is claimed existed in this case, and the same withholding of moneys lawfully due, but it showed over and above all that an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due to him from such other debtors. It was this keeping of other moneys from the plaintiff's hands, and not the refusal by defendant to pay his own debt, which was the ruling fact in that case, and which was equivalent, in our opinion, to duress of goods.

These views render a reversal of the judgment necessary, and the case will be remanded for a new trial, with costs to the plaintiffs in error.

Cable v. Foley, 45 Minn. 421.

A threat by a judgment creditor to obtain satisfaction by a levy upon the property of the debtor, being to exercise his legal right simply, is not duress: *Wilcox v. Howland*, 23 Pick. 167.

A contract extorted from a person under a threat to resort to criminal proceedings against the party, or members of his family, is invalid.

FIRST NAT. BANK *v.* BRYAN *et al.*

Supreme Court of Iowa 1883.

62 Iowa, 42.

DAY, C. J. I. The appellant insists that the answer does not set up that the note and mortgage were obtained by duress. The appellees filed an amended abstract setting forth that the defendant, under leave of Court, filed an amended answer to meet the evidence, formally setting up that the note and mortgage were made under duress. The appellant denies that such amendment was filed. We have examined the transcript and do not find any reference to such amendment. However, we regard this question as immaterial. The original answer sets up facts sufficient to present the defence of duress, in view of the fact that the evidence was admitted without objection.

II. It appears from the evidence that Solon Bryan had a contract for erecting a school-house in Harlan; that he purchased the bricks therefor from P. F. Nelson, and that, to secure \$945 of the purchase price, he executed a chattel mortgage upon one hundred and fifty thousand of the bricks; that he failed in the execution of his contract, and turned over his contract, together with the bricks mortgaged to Nelson, to the sureties on his bond for the performance of his contract; and that they assumed and completed the erection of the building. It further appears that the sureties had knowledge of the existence of the mortgage when they took the assignment of the contract. The attorney of Nelson locked Solon Bryan in his office, and demanded a mortgage to secure the balance due on the bricks, which was then \$645, and represented that unless he executed the mortgage he was liable to prosecution, and would probably be prosecuted for selling and disposing of mortgaged property. The attorney also procured a letter to Mary

E. Bryan from her husband for a description of the homestead property. She at first refused to furnish a description without seeing her husband. The attorney of Nelson told her that she could not see her husband, that he was locked up in his office and could not come out; that Bryan had sold mortgaged property; and that they had a warrant for his arrest, and that if she would give a description of the homestead for a mortgage it would save his arrest; that it was a penitentiary offence to sell mortgaged property, and that if she did not give the description they would send him to the penitentiary. Mary E. Bryan went to the office of the attorney and was admitted, and her husband then told her that they had got him into some trouble, and that by giving a mortgage upon the homestead for a short time it would help him out. It seems that the note and mortgage were executed at that time and place. Mary E. Bryan testifies that she was induced to sign the mortgage by what the attorney had said, that it would save Mr. Bryan's arrest, and that they would straighten it up before the mortgage was due. We are satisfied that the execution of the mortgage was not the voluntary act of Mary E. Bryan, and that it was obtained by duress under the doctrine of *Green and Densmore v. Scranage*, 19 Iowa, 461.

III. The most important question in the case is as to whether the plaintiff, an innocent holder of the note before maturity, is entitled to a foreclosure of the mortgage. It has been held by this Court that a *bona fide* indorsee before maturity of a note secured by a mortgage, without notice of infirmities, takes the mortgage as he takes the note, free from the defences to which it is subject in the hands of the mortgagee: *Preston, Kean & Co. v. Morris, Case & Co.*, 42 Iowa, 549; *The Farmers' National Bank of Salem v. Fletcher*, 44 Id. 252; *Clasey v. Sigg et al.*, 51 Id. 371. In all of these cases the mortgages were voluntarily executed upon the property of the persons who executed the notes. Beyond the doctrine of these cases we do not feel justified in going in the application to mortgages of the principles which pertain to negotiable paper. In *Burbank v. Warnich*, 52 Iowa, 493, when no note was delivered with the mortgage to the mortgagee, it was held that an assignee of the mortgagee took it subject to all equities between the original parties. In

Tabor v. Foy, 56 Iowa, 539, where the note accompanying the mortgage was forged, it was held that the assignee of the mortgage took it subject to all defences existing against it in the hands of the mortgagee, notwithstanding the admission of the mortgagor that she signed the mortgage. This case differs from all those which have heretofore been determined in this Court. In this case the mortgaged property belongs to Mary E. Bryan, who did not sign the note, and the mortgaged property is her homestead. Her execution of the mortgage was procured by duress, and not her free and voluntary act. Section 1990 of the Code requires the concurrence of both the husband and wife to a conveyance or incumbrance of the homestead. Mary E. Bryan did not legally concur in this conveyance. As between her and the mortgagee the mortgage was void. Mortgages are not intended to circulate as commercial paper, and we do not think that the interests of commerce require that the principles applicable to negotiable paper shall be extended to a mortgage executed under such circumstances as the mortgage in question. The judgment of the Court below is
Affirmed.

Town of Sharon v. Gager, 46 Conn. 189; (*Son*) *Harris v. Carmody*, 131 Mass. 51.

The duress which will avoid a contract must have been practised upon the party seeking to avoid it.

ROBINSON *v.* GOULD.

Supreme Judicial Court of Massachusetts, 1853.

11 Cushing, 55.

BIGELOW, J. The general rule of law is well established, on reasons of justice and sound policy, that contracts, in order to be valid and binding, must be the result of the free assent of the parties. Therefore duress, either of actual imprisonment or *per minas*, constitutes a good defence to an action on a contract in behalf of those from whom contracts have been thus

extorted. Duress by menaces, which is deemed sufficient to avoid contracts, includes a threat of imprisonment, inducing a reasonable fear of loss of liberty: 2 Rol. Ab. 124; 2 Inst. 482-3; Bac. Ab. Duress (A.); 20 Amer. Jur. 24; Chit. on Cont. 168. It is also well settled that the duress which will avoid a contract must be offered to the party who seeks to take advantage of it. This was early adjudged in *Mantel v. Gibbs*, 1 Brownlow, 64, where, to an action of debt, brought on an obligation, the defendant pleaded that a stranger was imprisoned until the defendant, as surety for the stranger, made the bond. This was held a bad plea. The same principle is laid down in *Hanscombe v. Standing*, Cro. Jac. 187, where it was held that none shall avoid his own bond for the imprisonment or danger of any other than of himself only, and although the bond be avoidable as to the one, yet it is good as to the other: *Wayne v. Sands*, 1 Freeman, 351; *Shep. Touch.* 62; *McClintock v. Cummins*, 3 McLean, 158; 20 Amer. Jur. 26.

And certainly this distinction rests on sound principle. He only should be allowed to avoid his contract, upon whom the unlawful restraint or fear has operated. The contract of a surety, if his own free act, and executed without coercion or illegal menace, should be held binding. The duress of his principal cannot affect his free agency or in any way control his action. It may excite his feelings, awaken his generosity, and induce him to act from motives of charity and benevolence towards his neighbor; but these can furnish no valid ground of defence against his contract, which he has entered into freely and without coercion.

The case at bar falls very clearly within this principle. The defendant was put under no restraint; no threats were made to him. His principal may have been coerced to apply to the defendant to be his surety, but there is nothing in the case which tends to show any duress towards the defendant.

There was, too, a valid consideration for the note of the defendant as between him and the plaintiff. The jury have found that the note in suit was in fact given in consideration of an agreement by the plaintiff to forbear and give day of payment to the principal and an actual forbearance by the plaintiff in pursuance of this agreement. This constitutes a

sufficient consideration for the note declared on, moving between the plaintiff and the defendant. The case, therefore, is exactly this: a promise by the defendant, upon a valid consideration, freely assented to by him without restraint or coercion of any kind. Upon familiar principles such a contract is legal and binding. In this view, the instructions given to the jury were sufficiently favorable to the defendant. The facts wholly failed to establish the defence relied upon.

Exception overruled.

But otherwise where the duress was practised upon one bound by family ties to the person so seeking to avoid it: as in case of husband and wife, parent and child, etc.

HARRIS *v.* CARMODY.

Supreme Judicial Court of Massachusetts, 1881.

131 Mass. 51.

MORTON, J. At the trial, the evidence tended to show that the plaintiff sued the male defendant upon several promissory notes purporting to have been indorsed by him; that the defendant set up in that suit that the notes were not indorsed by him, but his pretended signatures were forged by his son; and that a settlement of that suit was made, under which the defendant gave his note for one thousand dollars, secured by a mortgage of real estate.

In the case at bar, the defendant seeks to avoid this mortgage upon the ground that he was induced to execute it by duress. The evidence tended to show that he was induced to execute it by threats of the prosecution and imprisonment of his son. The Court instructed the jury as to what would constitute duress, without objection being taken; and then ruled in substance that the defendant could avoid the mortgage by proof of duress to his son. The plaintiff excepted to this ruling, and the first question is as to its correctness.

At common law, as a general rule, the defence of duress *per*

minas must be sustained by proof of threats which create a reasonable fear of loss of life, or of great bodily harm, or of imprisonment of the person to whom the threats are made, and one man cannot avoid his obligation by reason of duress to another. There is a well-settled exception to this rule in the case of husband and wife, all the authorities agreeing that each may avoid a contract if it was made to relieve the other from duress: Shep. Touch. 61; Met. Con. 28, and note; *Robinson v. Gould*, 11 Cush. 55, and cases cited.

The question whether this exception extends to the relation of parent and child does not appear to have been expressly adjudicated. But we find many *dicta* of Judges and statements of authors entitled to great respect, which show that from the earlier times it has been considered as the settled law that the relation of parent and child was within the exception.

In a note to *Bayly v. Clare*, 2 Brownl. 275, 276, in the Common Bench, Michaelmas Term, 7 Jac. 1, it is said that "the husband may avoid the deed that he hath sealed by the duress of imprisonment of his wife or son, but not of his servant." This is evidently the same case stated by Sergeant Rolfe in his Abridgment, as follows: "A servant shall not avoid his deed made by duress to his master: M. 7, Ja. B. per Coke. But a son shall avoid his deed by duress to his father: M. 7, Ja. B. per Coke. The husband shall avoid a deed by duress to his wife: M. 7, Ja. B. per Coke." 1 Rol. Ab. 687, pls. 4-6.

LORD BACON, under the maxim, *Persona conjuncta æquiparatur interesse proprio*, wrote: "So if a man menace me, that he will imprison or hurt in body my father or my child except I make unto him an obligation I shall avoid this duress, as well as if the duress had been to mine own person:" Bac. Max. reg. 18.

The same law is explicitly laid down without question by the author of Bacon's Abridgment and by Mr. Dane and by Mr. Justice McLEAN: Bac. Ab. B.; 5 Dane Ab. 166, 375; *McClintock v. Cummins*, 3 McLean, 158, 159.

In *Wayne v. Sands*, 1 Freem. 351, the point decided was that a plea, that one Robinson was jointly bound with the defendant, and that Robinson entered into the contract by duress, was bad. The reporter attributes to WYLDE, J., the remark that, "if the duress be to a father or brother, and a son enter into bond, this

is a duress to the son," and to TWISDEN, J., the remark that "a man shall in no case avoid his deed by a duress to another, let him be related how he will." The case is too imperfectly reported to be of great weight, and it is to be observed that the remark attributed to TWISDEN, J., would exclude the case of husband and wife, in opposition to all the authorities. In the report of the same case, under the name of *Warn v. Sandown*, in 3 Keb. 238, it is said that there was "*per curiam* judgment for the plaintiff; this Roberts being no father, husband, wife, nor near relation, in which cases the bond would be void."

We are not referred to any modern authorities opposed to the views of the learned Judges and authors whom we have cited. The exception in favor of husband and wife is not based solely upon the legal fiction that they are in law one person, but rather upon the nearness and tenderness of the relation. The substantial reasons for the exception apply as strongly to the case of a parent and child as to that of a husband and wife. No more powerful and constraining force can be brought to bear upon a man, to overcome his will and extort from him an obligation, than threats of great injury to his child. Both upon reason and upon the weight of the authorities we are of opinion that a parent may avoid his obligation by duress to his child, and therefore that the ruling of the Superior Court upon this point was correct.

The plaintiff contends that the defence of duress was not open under the pleadings. In a case where the plaintiff declares upon an executory contract, if the defendant relies upon duress, he must specify it in his answer. It is then a substantive fact in avoidance of the plaintiff's case, which must be set up: Gen. Sts., c. 129, §§ 17-27. But this is a suit under the Gen. Sts., c. 137, and the St. of 1879, c. 237, in which the plaintiff sets up that the defendants are in the possession of certain land which they hold "unlawfully and against the right of said plaintiff." The provisions of the practice Act above cited do not apply to it: *Taylor v. New England Coal Mining Co.*, 4 Allen, 577. Any evidence, which goes to show that the deed under which the plaintiff claims the right of possession is invalid, is admissible under the general issue, as it sustains the defen-

dants' denial of the plaintiff's allegations. The evidence of duress was therefore properly admitted.

Exceptions overruled.

Nevada Bank v. Bryan, 62 Iowa, 42 ; *Osborn v. Robbins*, 36 N. Y. 365.

Contracts so procured are voidable and not void : *Veach v. Thompson*, 15 Iowa, 380 ; *Worcester v. Eaton*, 13 Mass. 369.

Hence they may be ratified : 1 Whart. § 145.

But "physical compulsion precludes *assent*," hence, contracts so procured are *void* : 1 Whart. § 145.

MISTAKE.

In order to be reciprocal, contracts must also be free from mistake: (a) As to the nature of the transaction; (b) As to the person with whom the contract is made; and (c) As to the subject-matter of the contract; (d) As to the identity of the subject-matter; (e) Mutual mistake as to essential elements of the subject-matter; (f) Mistake as to the price.

(a) Nature of the transaction.

HEWETT v. JONES.

Supreme Court of Illinois, 1874.

72 Ill. 218.

MCALLISTER, J. This action was brought by appellant, in the Jefferson Circuit Court, as assignee of a promissory note, against appellee as maker. The defendants set up by special plea the defence, that the execution of the note was obtained by a patent-right vendor and his agent, by means of fraud and circumvention, setting out the circumstances, and the fraudulent substitution of a note for another paper purporting only to be an appointment of appellee as agent to sell a patent hay fork. There was a change of venue to Marion County, where

the cause was tried, resulting in a verdict and judgment for defendant. The plaintiff brings the case to this Court by appeal.

The testimony for defendant below tended strongly to show that the execution of the note sued on was obtained by fraud and circumvention. It is true there was some conflicting evidence, but it was for the jury to determine all questions of the credibility of witnesses.

The defence set up was not an unconscionable, but a meritorious defence, recognized by the common law as well as by statute. It was the only defence relied upon. There was evidence tending to support it. The instructions for defendant below, claimed by appellant's counsel to be erroneous, all relate to the question of notice to the plaintiff at the time he purchased the note. If the execution was obtained by fraud or circumvention, it is wholly immaterial whether the appellant took the note with or without notice of that defence, because if the execution of it was so procured, it would be void in his hands, even if he were a *bona fide* holder without notice.

The propositions embraced in the instructions complained of principally relate to the question of notice, and are, therefore, not material to any point of the defence.

We have no doubt, from reading the testimony in the record, that the appellee had no idea of signing or giving a promissory note, and that his signature was obtained by the artful device, frequently put into use by patent-right vendors and their agents, by which they procure the signature of a party to a promissory note when that party has no intention of signing one, and supposes he is executing an instrument of a wholly different nature. If the case should go before another jury, it would, without doubt, result in the same verdict as before. The question arises, should this Court reverse for the misdirection of the jury under these circumstances? If the law required the Court below to grant a new trial for that reason, then, clearly, this Court should reverse for the denial of the motion. Was the plaintiff below entitled to a new trial as a matter of right? It was the settled rule of the common law, as administered by the King's Bench, that the Court in this respect was

clothed with a discretion, which was exercised with a view to the promotion of justice and repression of litigation.

In *Deerby v. The Duchess of Mazarine*, 2 Salk. 640, the defendant was sued for debts contracted by her while living in England as a *feme sole*. She set up coverture, and gave good evidence to support it. The jury found for the plaintiff, and the Court would not grant a new trial, because there was no reason why the duchess, who lived there as a *feme sole*, should set up coverture to avoid the payment of her just debts.

In *Macrow v. Hull*, 1 Burrows, 11, the action was for trespass of a trifling nature, entitling the plaintiff to only nominal damages. The trespass was shown by the evidence, but the jury found for the defendant. The Court held that, notwithstanding the verdict being against evidence, which, in general, is a good reason for setting it aside and granting a new trial, yet, the action appearing to be frivolous, trifling, and vexatious, and the *real* damages little or none, they ought to refuse, and accordingly did refuse to set the verdict aside.

In *Farewell v. Chaffey*, 1 Burr. 54, LORD MANSFIELD said a new trial ought to be granted to attain real justice, but not to gratify litigious passions upon every point of *summum jus*, and it was there held, the Court would not give a second chance of success to a hard action of unconscionable defence.

In *Edmonson v. Machell*, 2 Term R. 4, a new trial was moved for on the ground of a misdirection in point of law. The Court having looked into the evidence, and become satisfied that justice had been done, denied the motion, without giving any positive opinion upon the question of law. ASHURST, J., in giving the opinion of the Court, said: "An application for a new trial is an application to the discretion of the Court, who ought to exercise that discretion in such a manner as will best answer the ends of justice."

So, in *Edwards v. Evans*, 3 East, 451, where a witness was excluded upon a supposed ground of incompetency, the Court denied a motion for a new trial, because another witness was called and established the same fact offered to be proved by the rejected witness, which was not disputed by the other side, and the defence proceeded upon a collateral point, on which the verdict turned.

In *Seare v. Prentice*, 8 East, 348, the Court refused a new trial for misdirection upon a point which did not arise in the case.

The statute of this State authorizes the assignment of error upon the refusal of a motion for new trial, but the Circuit Courts are nevertheless regarded by this Court as clothed with a discretion, as at common law, to be exercised in such manner as will best answer the ends of justice. Upon this ground it has been held, in numerous cases, that when it clearly appears that on another trial a verdict must inevitably be the same, or that substantial justice has been done, a new trial will not be granted, although the Court erred in some of its instructions: *McConnel v. Kibbe*, 33 Ill. 175; *Curtis v. Sage*, 35 Id. 22; *Coursen v. Ely*, 37 Id. 338; *Root v. Curtis*, 38 Id. 192; *Boyn-ton v. Holmes*, Id. 59; *Potter v. Potter*, 41 Id. 80; *Watson v. Wolverton*, Id. 241; *Clark v. Pageter*, 45 Id. 185; *Pahlman v. King*, 49 Id. 266; *Rankin v. Taylor*, Id. 451; *Booth v. Hynes*, 54 Id. 363; *Steudle v. Rentchler*, 64 Id. 161.

Being satisfied that justice has been done in this case, it would be a departure from principle to reverse for the misdirection complained of. The judgment will therefore be affirmed.

Judgment affirmed.

(b) As to the person contracting.

BOSTON ICE COMPANY *v.* POTTER.

Supreme Judicial Court of Massachusetts, 1877.

123 Mass. 28.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered

ice to the defendant for one year without notifying the defendant, as the presiding Judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding Judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit: *Hills v. Snell*, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know: *Orcutt v. Nelson*, 1 Gray, 536, 542; *Winchester v. Howard*, 97 Mass. 303; *Hardman v. Booth*, 1 H. & C. 803; *Humble v. Hunter*, 12 Q. B. 310; *Robson v. Drummond*, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be im-

plied: *Mudge v. Oliver*, 1 Allen, 74; *Orcutt v. Nelson*, *ubi supra*; *Mitchell v. Lapage*, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling v. Thonlinson*, 6 Taunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton v. Jones*, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of BARON BRAMWELL, though the other Judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of

set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.

Cundy v. Lindsay, L. R., 3 Appeal Cases, 465; *Gregory v. Wendell*, 40 Mich. 443; *Randolph Iron Company v. Elliott*, 34 N. J. L. 184.

(c) Mistake as to the existence of the subject-matter.

GIBSON v. PELKIE.

Supreme Court of Michigan, 1877.

30 Mich. 380.

GRAVES, J. The right Gibson asserts is based solely on an alleged special agreement entitling him to collect so much as he might of a specific judgment and to retain one-half of the sum collected. According to his own statement of his case, the judgment was the exclusive subject-matter of the agreement relied on. No other demand or form of demand entered into the bargain. The parties had nothing else in their minds. They did not assume to contract about an unliquidated claim or an unadjudicated cause of action, the enforcement of which in Pelkie's name might involve him in a much larger liability than would be likely to attend the collection of a judgment. It was a judgment which formed the subject-matter of the bargain. Such was the claim made by the declaration, and such was the case in issue. No other ground for recovery appears. Now, there was no proof of a judgment; but there was evidence concerning one, and it seems to have been in

effect conceded that there was something which had been taken to be a judgment, but which was so defective that it could not avail anything.

The case must be viewed as it is. It is not admissible to arbitrarily admit one part and reject another. If what there is to show that the supposed judgment was void is rejected, then all there is to make out the existence of any such judgment will be stricken out ; and if that be done, there will be no proof whatever of the essence of the cause of action set up. There will be no showing that there was any subject-matter for the alleged agreement, and no proof to maintain the actual averments of the declaration. The cause is presented here by both sides upon the theory that there was something which was intended as a judgment, but which was void and hence uncollectible, and the plaintiff in error cannot ask a more favorable view of the record. If then there was a proceeding which was meant to be a judgment, but which was void, there was nothing to which the actual bargaining could attach. There was no subject-matter. The parties supposed there was a judgment, and negotiated and agreed on that basis, but there was none. Where they assumed there was substance, there was no substance. They made no contract, because the thing they supposed to exist, and the existence of which was indispensable to the institution of the contract, had no existence : *Allen v. Hammond*, 11 Pet. 63 ; *Suydam v. Olark*, 2 Sandf. Sup'r Court Rep. 133 ; *Gove v. Wooster*, Lalor's Supp. to Hill & Den. 30 ; *Smidt v. Tiden*, L. R., 9 Q. B. 446 ; 9 Eng. 379 ; *Conturier v. Hastie*, 5 H. L. 673 ; *Hazard v. New England Ins. Co.*, 1 Sumn. 218 ; *Silvernail v. Cole*, 12 Barb. 685 ; *Sherman v. Barnard*, 19 Id. 291 ; *Metcalf on Cont.* 30, 31 ; 1 Poth. Ob. by Evans, 113 ; *Benjamin on Sales*, §§ 76, 77, Ch. 4 ; 4 Kent Com. 468. It is therefore the opinion of a majority of the Court that the judgment in *Pelkie's* favor ought not to be disturbed.

Judgment is affirmed, with costs.

See cases cited in above opinion.

(d) As to the identity of the subject-matter.

GARDNER v. LANE.

Supreme Judicial Court of Massachusetts, 1865.

9 Allen, 492.

BIGELOW, C. J. 1. The evidence offered by the defendant and rejected was clearly incompetent. This is not an action in which an assignee in insolvency is seeking to recover property belonging to the insolvent debtor for the purpose of distribution among all the creditors. It is a controversy between two creditors, each of them striving to hold property of their debtor against the other for the purpose of appropriating it in payment of their pre-existing debts, by way of preference over other creditors. Neither of them can claim any rights in this action under the proceedings in insolvency. The provisions of the insolvent laws for the avoidance of sales, transfers, and attachments, which may operate as a preference, are designed exclusively for the benefit of those who come in under the assignee or otherwise to obtain an equal share of the property of the insolvent in the mode provided by law; and these provisions cannot be invoked in aid of a person who stands only in the position of a creditor, endeavoring to secure his whole debt, either by means of a sale or by an attachment: *Penniman v. Cole*, 8 Met. 496, 500; *Burt v. Perkins*, 9 Gray, 320. The rights of creditors under the insolvent proceedings can in no way be affected by the result of the issue between the parties to this suit. If the property in controversy can be rightfully claimed by the assignee in insolvency for the benefit of creditors, his title to it can be asserted with like effect, whether the plaintiff or the defendant succeeds in establishing a right of possession and property in this action.

2. Other and more interesting questions were raised at the trial, and remain to be considered. The first and most important one is, whether on the evidence adduced at the trial any title passed to the plaintiff, under the contract of sale set up by

him, to that part of the property replevined which is described in the writ "as forty-six barrels of No. 3 mackerel, and forty-eight barrels filled with salt." The facts in regard to the articles are few and simple. The plaintiff entered into a contract of sale with the original owners of the property, under whom both parties claim, for one hundred and thirty-five barrels of No. 1 mackerel, at ten dollars per barrel, amounting with inspector's fees to \$1397.25, for which payment was made by the plaintiff by releasing claims against the vendors for about thirteen hundred and fifty dollars, and by money to the amount of about fifty-five dollars. This transaction took place on the 26th day of November, 1862. No delivery, however, of the mackerel included in the contract of sale then took place, but subsequently, five or six weeks afterwards, a delivery was made of certain barrels supposed to contain No. 1 mackerel, in pursuance of the contract; of the barrels so delivered, a large number did not contain No. 1 mackerel, but instead thereof forty-five barrels contained No. 3 mackerel, and forty-eight contained salt only, and these were delivered by mistake as a part of the one hundred and thirty-five barrels of No. 1 mackerel which were agreed to be sold to the plaintiff.

On these facts it seems to us to be inconsistent with elementary principles to hold that any property in the barrels of No. 3 mackerel and of salt passed to the plaintiff. To constitute a valid sale of goods, wares, and merchandise, complete and consummate, so as to pass the property to them, there must be an agreement or contract of sale by which the vendor agrees that the articles shall pass to and become the property of the vendee. Without such contract or agreement there can be no sale. Delivery is not always essential. As between the vendor and vendee of specific chattels *in esse*, the title will pass when the contract of sale is complete without delivery. But the minds of the parties must meet, and there must be a mutual assent to the transfer of certain specified property before any change of title to it can be effected. Until this takes place, that is, until there is an agreement to sell certain specific, identical goods, there can be no actual sale or change of ownership. So strictly is this held, that where goods, part of an entire bulk or mass, are agreed to be sold, the contract of sale is deemed to

be incomplete, and no property passes, if such part has not been separated or designated in such manner that it may be distinguished from the mass or bulk with which it is mingled. Until the parties are agreed as to the specific, identical goods, the contract can be no more than an agreement to supply goods of a certain kind or answering a particular description. The reason of this is obvious. There can be no transfer of property until the parties have ascertained and agreed upon the articles sold. Before they are designated and set apart in some form, there is nothing to which the contract of sale can attach, or on which it can operate: *Chit. Con.* (10th Amer. ed.) 393-398; *Aldridge v. Johnson*, 7 El. & Bl. 885; *Scudder v. Worster*, 11 Cush. 573. It necessarily follows from these familiar principles that where parties to a contract of sale agree to sell and purchase a certain kind or description of property not yet ascertained, distinguished, or set apart, and subsequently a delivery is made by mistake of articles differing in their nature or quality from those agreed to be sold, no title passes by such delivery. They are not included within the contract of sale; the vendor has not agreed to sell nor the vendee to purchase them; the subject-matter of the contract has been mistaken, and neither party can be held to an execution of the contract to which he has not given his assent. It is a case where, through mutual misapprehension, the contract of sale is incomplete. Delivery, of itself, can pass no title; it can be effective and operative only when made as incidental to and in pursuance of a previous contract of sale. Such a case seems clearly to fall within that class in which, through mistake, a contract which the parties intended to make fails of effect; as where, in a negotiation for a sale of property, the seller has reference to one article and the buyer to another, or where the parties supposed the property to be in existence when in fact it had been destroyed. In such cases the contract is ineffectual because the parties did not in fact agree as to the subject-matter, or because it had no existence: *Rice v. Dwight Manuf. Co.*, 2 Cush. 86. So in the case at bar. The contract of sale did not pass the property, as against attaching creditors, because there was no delivery to the vendee of that which constituted the subject-matter of the contract; the delivery of different

articles from those embraced in the contract is inoperative, for the reason that there is no agreement for their purchase and sale. And this is the precise distinction which marks the line between the case at bar and those cited by the learned counsel for the plaintiff. In all of the latter the particular articles which formed the subject of the sale and delivery were mutually agreed upon; there was no mistake or misapprehension concerning them; the same goods which the vendor agreed to sell and the vendee to buy, were delivered. The mistake was only as to the quality of the article; it was the same identical thing in specie as that respecting which the parties had negotiated. Although in such cases there can be no doubt of the right of the vendee to rescind the sale and return the property, by reason of a breach of warranty or fraud, there is as little doubt that the title to the property passes, subject only to such disaffirmance by the vendee. The error at the trial consisted in losing sight of the distinction between cases of this character and the one at bar; between an agreement to sell and deliver a specified article, concerning the quality of which the parties were deceived or mistaken, and an agreement to sell one article and a delivery by mistake of a wholly different article, which did not form the subject-matter of the agreement. In the former the title passes at the election of the vendee; in the latter it does not. This view of the principles of law applicable to the facts developed at the trial shows very clearly that the second instruction asked for by the defendant was in substance correct, and should have been given to the jury, as the ruling by which they were to be governed in considering and applying the testimony.

8. It is somewhat difficult to understand the precise posture of the case at the trial, on the point raised in the third prayer for instruction submitted by the defendant. We are by no means sure that the point is open on the pleadings; but assuming it to be so, we do not think it tenable. It is certainly true as an abstract proposition that an officer in serving a writ of replevin can take only such property as properly comes within the terms of the description contained in the writ. But it is an error to suppose that the term "barrel" necessarily imports

a definite and precise description of a particular article or thing. It may be and often is used to designate a certain quantity, and not the vessel or cask in which an article is contained. There is nothing on the face of the writ to show that it was used in the latter sense; on the contrary, the evidence tended very clearly to show, and the jury have found under the instructions of the Court, that the term "barrel" was not intended as a precise and definite description of the specific articles which the sheriff was commanded to replevy, but as a designation of the quantity of a particular kind or quality of mackerel which he was to take, irrespective of the mode in which it was packed, or the particular vessels or casks in which it was contained. Nor does the case stop here. It appears that the defendant so understood the description in the writ, and assented that it should be served by taking a sufficient number of half barrels to make up the quantity which the sheriff was required to replevy. After such assent the defendant cannot be permitted to say that the description in the writ was imperfect or insufficient to warrant the service of the writ. The plaintiff having acted on the strength of the assent of the defendant, and incurred the expense of completing the service and prosecuting the suit for the purpose of litigating the title to the property which was actually replevied, it would be unjust and unreasonable to allow the defendant now to defeat the right of the plaintiff to hold a part of the property on the ground of any defect or ambiguity in the description of the property in the writ.

4. The only remaining point of exception arises on the first prayer for instruction. It seems to us the verdict rendered under the instructions given leaves no question open to the defendant on this point of the case. The jury must have found that the half barrels of mackerel were included in the sale and delivery. A mere mistake in the bill of sale, or the description of the mode in which the property was packed, would not prevent the property passing by the delivery, if it was of the same kind and quality as that which the parties intended to include in their agreement.

The result is that the case must go to a new trial in conse-

quence of misdirection on the point raised in the second prayer for instructions submitted by the defendant.

Exceptions sustained.

Where one party thinks he is buying one piece of land, and the other party has a different lot in mind as the one he is selling, there is no contract : *Kyle v. Kavanaugh*, 103 Mass. 356.

(e) Mutual mistake as to essential elements of the subject-matter.

SHERWOOD v. WALKER.

Supreme Court of Michigan, 1877.

66 Mich. 568.

MORSE, J. Replevin for a cow. Suit commenced in justice's Court. Judgment for plaintiff. Appealed to Circuit Court of Wayne County, and verdict and judgment for plaintiff in that Court. The defendants bring error, and set out 25 assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow.

The plaintiff claims that the title passed, and bases his action upon such claim.

The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff.

The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne County, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle.

The plaintiff is a banker living at Plymouth, in Wayne County. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement

at the time that they were probably barren, and would not breed.

May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter he called upon one of the defendants with the view of purchasing a cow known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, light weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendant to confirm the sale in writing, which they did by sending him the following letter:—

"WALKERVILLE, May 15, 1886.

"T. C. SHERWOOD,

"President, etc.,—

"*Dear Sir:* We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer.

"Yours truly,

"HIRAM WALKER & SONS."

The order upon Graham inclosed in the letter read as follows:—

"WALKERVILLE, May 15, 1886.

"*George Graham:* You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with cow, and have her weighed.

"Yours truly,

"HIRAM WALKER & SONS."

On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after the plaintiff tendered to Hiram Walker, one of the defendants, \$80, and

demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit.

After he had secured possession of the cow under the writ or replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1420 pounds.

When the plaintiff, upon the trial in the Circuit Court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant, and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The Court refused the motion, and an exception was taken.

The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost \$850, and if not barren would be worth from \$750 to \$1000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following.

On the nineteenth of May the plaintiff wrote Graham as follows:—

“PLYMOUTH, May 19, 1886.

“MR. GEORGE GRAHAM,

“Greenfield,—

“*Dear Sir:* I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning.

“Yours, etc.,

“T. C. SHERWOOD.”

Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wish-

ing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 18, 1886, in which they named the price of five cattle, including Lucy at \$90, and Rose 2d at \$80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The Circuit Judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order; if they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and plaintiff would be entitled to recover.

The defendants submitted a number of requests, which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The Court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the Circuit Judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to

whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftentimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over \$50, the contract of sale, in order to be valid, must be one where the purchaser has received or accepted a part of the goods, or given something in earnest or in part payment, or where the seller has signed some note or memorandum in writing: How. Stat. § 6186.

Here there was no actual delivery, or anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the purchase-price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yard, or to send check by mail

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow, upon presentation of the order, at such cattle-yard. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and, by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no doubt the cow would have passed with the sending and receipt of the letter and order by the plaintiff.

Payment was not to be a concurrent act with the delivery, and therein this case differs from *Case v. Dewey*, 55 Mich. 116. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep;

and it was held that such delivery could only be made by a surrender of the possession to the vendee, and an acceptance by him.

Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where the article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the Statute of Frauds does not interpose, without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by the jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff.

I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence of any act of the defendants, or any agent of theirs, to be well or accurately done. It could make no difference where or when she was weighed, if the same was done upon correct scales, and by a competent person. There is no pretence but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be done before the delivery even, or the passing of the title. The order to Graham is to

deliver her, and then follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of payment of the price, or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that, before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this Court support the instruction of the Court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: *Lingham v. Eggleston*, 27 Mich. 324; *Wilkinson v. Holiday*, 33 Id. 386; *Grant v. Merchants' and Manufacturers' Bank*, 35 Id. 527; *Carpenter v. Graham*, 42 Id. 194; *Brewer v. Michigan Salt Ass'n*, 47 Id. 534; *Whitcomb v. Whitney*, 24 Id. 486; *Byles v. Colier*, 54 Id. 1; *Scotten v. Sutter*, 37 Id. 526, 532; *Ducey Lumber Co. v. Lane*, 58 Id. 520, 525; *Jenkinson v. Monroe Bros. & Co.*, 61 Id. 454.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so.

The Circuit Judge ruled that this fact did not avoid the sale, and it made no difference whether she was barren or not. I

am of the opinion that the Court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact—such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual: 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales (4th ed), §§ 148, 377. See, also, *Cutts v. Guild*, 57 N. Y. 229; *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 9 Allen, 492; s. c. 12 Allen, 44; *Hutchmacher v. Harris' Adm'rs*, 38 Penn. St. 491; *Byers v. Chapin*, 28 Ohio St. 300; *Gibson v. Pelkie*, 37 Mich. 380, and cases cited; *Allen v. Hammond*, 11 Pet. 63, 71.

If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding.

“The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration:” *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580, 588.

It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a

breeder she was worth at least \$750; if barren, she was worth not over \$80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one.

The Court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the Court below must be reversed, and a new trial granted, with costs of this Court to defendants.

Thwing v. Hall & Ducey Lumber Co., 40 Minn. 184. See, also, 33 N. W. R. 919.

(f) Mistake as to the price.

RUPLEY v. DAGGETT.

Supreme Court of Illinois, 1874.

74 Ill. 351.

SCOTT, J. It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for \$165, and it may be appellant was equally honest in the belief that he was buying at the price of \$65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was \$65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession, he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be \$165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for \$65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take any pay for property at a price he had never contracted to pay.

There was no error in refusing instructions asked by appellants. The Court was asked to tell the jury if they believed, from the evidence, appellee had "sworn wilfully and corruptly false in any material portion of his testimony, then they are at liberty to disregard his entire testimony, except so far as it may be corroborated by other evidence in the case." Conceding this instruction states a correct abstract principle of law, there was no necessity for giving it under the facts proven in this case. The verdict was right, and appellants were not prejudiced by the refusal of the Court to give it.

All that was pertinent to the issues in the other refused instructions was contained in others that were given, and there was no necessity for repeating it.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

Mistake as to mere quality of the thing sold does not vitiate the contract : 1 Whart. § 189, and cases cited ; 1 Benjamin on Sales, § 529.

Mistake as to the law in the State where the contract is made does not invalidate the contract : *Goltra v. Sanasack*, 53 Ill. 458 ; *Upton v. Tribilcock*, 91 U. S. 51.

Nor will mistake as to the legal effect of the terms used in the contract invalidate it : *Dodge v. Ins. Co.*, 12 Gray, 72 ; *Gordere v. Downing*, 18 Ill. 492.

Every one is presumed to know the law of his own State, but not that of any foreign State : *Haven v. Foster*, 9 Pick. 112.

UNDUE INFLUENCE.

A contract may be avoided upon the ground of undue influence when the party seeking to avoid it was induced to make the same through the wrongful use of power aforesaid: (a) By family relationship; (b) As to parent and child; (c) Guardian and ward; (d) Attorney and client; (e) Trustee and beneficiary; (f) By mental weakness of the party influenced; (g) By the necessities of the party influenced.

Undue influence defined.

NELSON'S WILL.

Supreme Court of Minnesota, 1888.

39 Minn. 204.

GILFILLAN, C. J. In January, 1886, the will of the late Col. Anderson D. Nelson was presented for probate in the Probate Court of Hennepin County. The sister of deceased, Mrs. Matilda J. Stockton, and John M. Stockton, her husband, appeared and contested. The Probate Court having allowed the will, the contestants appealed to the District Court, where, after a trial before a jury, the allowance and order of the Probate Court were affirmed, and from the judgment of the District Court the contestants appeal to this Court.

For the purpose of trial in the District Court, three issues were prepared: *First*, as to the actual due execution of the will; *second*, as to soundness of mind and competency to make a will on the part of deceased at the time it purports to have been signed; *third*, as to whether deceased was induced or procured to sign the will by threats, fraud, or oppression, or by the use of any undue influence. After the evidence was all in, it being full and uncontradicted that deceased executed (in fact) the will, the Court directed the jury to find on the first issue

in the affirmative. No exception is made, and none could be, to that. As to the third issue, the Court being of opinion that there was no evidence to sustain a verdict in the affirmative upon it, directed the jury to find in the negative. The propriety of that direction is made one of the questions on this appeal. The second issue was fully submitted to the jury for them to find upon it; and they found that deceased was at the time the will purports to have been signed of sound and disposing mind and memory, and competent to make a will.

Upon a careful examination of the evidence in the case, we do not find any upon which a verdict that the deceased was induced to execute the will by threats, fraud, oppression, or undue influence would be permitted to stand. "That is undue influence which amounts to constraint; which substitutes the will of another for that of the testator. It may be either through threats or fraud; but, however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made:" *Conley v. Nailor*, 118 U. S. 127 (6 Sup. Ct. Rep. 1001). It is "a coercion produced by importunity, or by a silent resistless power which the strong will often exercise over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear:" *Children's Aid Society v. Loveridge*, 70 N. Y. 387. These two quotations give as good an idea of what is not easily defined, "undue influence," as any we find. Merely urging considerations of gratitude, love, esteem, affection, or charity, so that the mind of the testator is left free to act and arrive at its own conclusions, is legitimate. These motives are entitled to their proper weight, and it is for the testator to determine how far they shall influence him in disposing of his property. To make a case of undue influence, the will must express the mind and intent of some one else, and not of the testator. From the nature of the case, the evidence of undue influence will generally be mainly circumstantial. It is not usually exercised openly, in the presence of others, so that it may be directly proved. But the circumstances relied on to show it must be such as, taken all together, point unmistakably to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter, and

not of the former ; mere ground of conjecture or guess is not enough.

In this case the only person as to whom there could be any pretext for charging undue influence over the testator was proponent, the wife of the testator. The facts relied on are, stating them briefly, these : The testator, an officer in the army, lived to the age of 57 without being married. In 1876 he married the proponent, then at the age of 27. The evidence indicates that their married life was happy. He had acquired considerable property, consisting mainly of real estate lying in Minneapolis and near St. Paul. He had always been very fond of his sister, Mrs. Stockton, and of her husband and children, and for many years had been very generous towards them, providing them from time to time with money to a large amount in the aggregate, interesting himself in the education of the children, and expressing an intention to provide for their future. His affection for and interest in the welfare of his sister and her family, and his intentions towards them, and with respect to the disposition of his property after his death, may be summed up by stating the facts that, within little more than a year and a half before his death, he executed two wills, prior to that in contest ; one executed June 11, 1884, in which, after some unimportant bequests, he devised and bequeathed one-half his real and personal property to his wife, and the other half to Mrs. Stockton and her issue, the whole to go to her or them in case his wife should die before he did ; the will giving, as the reason for so disposing of his property, that his wife will be amply provided with pecuniary means from another source, while his sister, with her large family, was in much need of the help which he proposed extending to her. He executed another will at the house of Mrs. Stockton, in Kentucky, December 7, 1885, about 22 days before he died. This will was drawn with his own hand, and its provisions do not seem to have been disclosed to any one till after his death. By this will he devised to his wife a building in Minneapolis worth about \$65,000 ; made a single bequest of his books ; and directs the remainder of his property in Minneapolis and St. Paul to be sold, and the proceeds, with his money in bank, to be equally divided between his wife and Mrs. Stockton ; all other of his effects to go

to his wife. No reason is apparent for the very considerable change made by this will in the disposition of his property. Contestants do not suggest any mental infirmity or undue influence as affecting its validity ; but, on the contrary, in their written objections to the later will, they set forth its execution and allege it to be the last and only valid will of the testator. The will in contest was executed at Thomasville, Ga., December 29, 1885, the day before his death, and it leaves his entire property to his wife. He had been very sick of pleuro-pneumonia at that place, continuously, since December 20th. The will was executed at 6 or half-past 6 in the evening, and at about 4 the next morning he died.

The theory urged by the contestants is that, prior to his illness, his wife had acquired a controlling influence over him ; that his illness weakened his mind and power of will to such extent that she, being in constant and almost exclusive attendance on him, took advantage of her influence over him, and of his weakness, physical and mental, to extort from him the execution of a will such as he would not otherwise have made. There is nothing in the evidence to indicate that she ever had any power to influence him beyond what naturally and rightfully belongs to a wife. Indeed, there is a notable lack of evidence showing their standing in that respect towards each other. There was no attempt to open out their domestic life prior to a few weeks before he died. There is no evidence tending to show that he was not a man of strong, independent will, or that he could be easily influenced by any one. There is evidence that his sight and hearing, and perhaps his memory, were impaired, though not beyond what is common to men of his age. That his sickness weakened in any way his mind and power of will there was no evidence, except that of experts—physicians who did not see him, but who testified that usually the disease of which he died, continuing so long as in his case, would have such effect on the brain and mind as to render the patient incapable of making a will. When the question is mental condition during such a disease, that sort of evidence is competent, and entitled to control where no better can be had. But as against the ample, direct, and positive evidence of the attending physician, and all those who saw and conversed with

the testator during his illness, and at the time of executing the will, to the effect that his mind was in no way impaired, the testimony of the experts was entitled to very little weight. On the issue of mental infirmity, the evidence barely justified its submission to the jury.

But the case is utterly barren of evidence tending to prove that Mrs. Nelson ever made any effort or attempt to influence the testator in disposing of his property. "It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence; there must be evidence that he did exert it:" *Cudney v. Cudney*, 68 N. Y. 148. Not a word or act of hers proved could be construed into such an attempt. Her own testimony was to the effect that the year they were married he told her of a will he had made; but that never after that did they have any conversation with regard to the disposition of his property until the day the contested will was executed. As to the conversation on that day, her testimony was that, when he was dictating to his friend Gen. Thom what disposition he wished to make of his property, she requested him to wait until he was well enough to attend to business matters, but he persisted. Nor is there any evidence tending to show that she ever tried to alienate him from contestants or their family. Upon the issue of undue influence, the case stands then solely on the facts that, having intended to provide for, and having executed prior wills making provision for his sister and her family, he, within a few weeks, made another will, revoking in effect all others, and leaving all his property to his wife. That being so, it comes within the principle affirmed in the case of *Storer's Will*, 28 Minn. 9 (8 N. W. Rep. 827), in which it was held that inequality, however great, in the distribution of the testator's property among those naturally the objects of his bounty, is not of itself, or even when accompanied with evidence tending to prove impaired mind and memory, evidence of undue influence on the part of those who seem to be favored by the will, though it may be shown in aid of other independent evidence of it. As was said in that case: "If it were evidence from which the jury might find undue influence to avoid the will, the issue practically presented to the jury in every case of the kind would be, is the

will such as the jury, if in the testator's circumstances, would have made? Few wills could stand if such were the test."

Upon the issue of mental capacity to make a will, the Court, at the request of the proponent, gave to the jury seventeen different instructions, covering, with the Court's modifications and explanations of them, more than four printed pages, containing various propositions of law, some of which certainly cannot be questioned, and are not questioned. To this the only exception was, "We except to the giving of the proponent's requests, which were given by the Court." We have so often held that an exception to a charge must be to some particular proposition stated by the Court, and which must be pointed out so that the attention of the Court will be specifically directed to the point, and that a general wholesale exception will be of no avail, that it is unnecessary for us to do more than refer to the rule and say the exception is insufficient. We will, however, though unnecessary, go further and say that, although the phraseology of two or three of the requests may be open to criticism, the explanations of the Court accompanying them, and especially its summing up of the law, after giving the requests, are so full, and in so clear, precise, and accurate terms, that the jury could not have got any but a correct understanding of the rules of law applicable to such a case.

There were some exceptions upon the exclusion or admission of evidence, only two of which, however, deserve special notice. The contestants asked of several of their witnesses, physicians, the question, in substance, whether, in their opinion, the change of the testator's life-long purpose to provide for his sister, occurring upon his death-bed, and being without apparent motive or reason, and otherwise altogether unexplained, would indicate any change in his intellect. We suppose the purpose of the question was to show a weakening of the intellect. It was not a question of the effect of physical disease on the mind. As to that the medical witnesses might and did answer. It was a question whether certain mental acts or operations indicated a strong or weak mind. Of that the jury were as competent judges as the most skilful physicians. It was not a matter of science. The question was correctly excluded. From the depositions of several of contestants' witnesses the Court,

on proponent's motion, struck out portions which contestants claim would show that, when the testator's remains were taken for burial to the place where contestants resided, and at the burial proponent acted in an unbecoming manner, one showing animosity to contestants, and a desire to avoid them. Upon reading the evidence so struck out, we do not think that it would show what contestants claim for it; but, if it did, it could certainly have no bearing upon the testator's mental capacity, and it would not, with the evidence admitted, make a case for the jury on the issue of undue influence; so that, if admitted, it could not have helped their case.

Judgment affirmed.

(a) Family relationship.

GRAHAM v. BURCH.

Supreme Court of Minnesota, 1890.

44 Minn. 33.

DICKINSON, J. The plaintiff, Mrs. Graham, and the defendant, Mrs. Burch, are sisters, the daughters and heirs-at-law of James Burns, who died in December, 1888, at the age of 73 years. The defendants, Mary Burch and Joseph Burch, are infant children of Mrs. Burch. This action is prosecuted to avoid two deeds of conveyance executed by Burns in May and December, 1887; one of the deeds conveying to Mrs. Burch a part of a lot of land in the city of St. Paul, the other conveying to her said infant children the remainder of the lot owned by the grantor. These deeds are sought to be avoided on the ground that their execution was procured by the exercise of undue influence by Mrs. Burch. The real question on this appeal is whether the finding of the trial Court, to the effect that the execution of the deeds was thus procured, was sustained by the evidence. The case places before us the facts and circumstances hereafter stated, concerning some of which there is no dispute, and all of which we regard as reasonably supported by the evidence.

Burns resided in St. Paul for many years prior to his death. The land in question was of the value of \$12,000, and, at the time of the conveyance under consideration, constituted, substantially, all the property belonging to Burns. The land was covered with buildings, from which he derived considerable rent. Mrs. Graham and Mrs. Burch had resided for many years in California. In the spring of 1886, after the death of Burns's wife, both the sisters came from California, Mrs. Burch bringing, also, her two infant children, above referred to; and they all took up their abode with Burns, at his home. Mrs. Burch always after that remained there, until the death of her father. Mrs. Graham returned to California in September, 1886; it being then understood, and in accordance with her father's request, that she should come back to St. Paul, and take her father to California, with her sister also, for future residence. In accordance with that arrangement she did return to St. Paul, after an absence of some two months; but in the mean time, without any apparent cause, her father seems to have become affected with some prejudice against her, and did not then wish her to come. However, kindly feelings were re-established, and she remained with her father until January, when she returned to California, and there remained. For several years prior to his death, Burns used intoxicating liquor constantly and to excess, living chiefly upon such stimulants. He was infirm and feeble in health, of an excitable temperament, forgetful, and childish. Animosity and prejudice were easily excited in him, and his intellect became enfeebled, so that he was easily influenced by those in whom he confided. His daughter, Mrs. Burch, secured his entire confidence. He intrusted to her the care and expenditure of his money. He confided in her judgment, was subject to her control, and submissive to her will. It may be taken to have been the purpose of Burns, as late as January, 1887, to leave his property, upon his death, to both his daughters; for at that time he executed a will devising to them this land in separate parcels. This was shortly before the plaintiff finally went back to California. The case suggests no reason for a change of purpose on his part, unless it is to be attributed to the influence exerted by Mrs. Burch, and by others at her instance, after her sister had gone

away, and when her father came to be wholly in her care, and, as some of the evidence went to show, wholly under her control. That she desired to secure a conveyance of the property to herself, and to exclude her sister from sharing in it, may be justly inferred from her own declarations and conduct, if the evidence bearing upon the fact is to be believed. It was also shown that she actually sought to accomplish this. She procured other persons to intercede with her father upon the subject in her behalf, and to the prejudice of her sister. In May, 1887, within a little more than three months after Mrs. Graham went away, and but little longer than after the execution of the will, Burns executed an absolute conveyance of the larger part of this land to Mrs. Burch, without consideration; and, in December of the same year, he conveyed the remainder of it to her said infant children by absolute deed, and without consideration, except the nominal consideration of one dollar, which Mrs. Burch placed in the hands of the children, to be handed to her father upon the execution of the deed. By these two conveyances the grantor completely divested himself of substantially all his property, he being then about 72 years of age. Nor does he appear to have been then in expectation of speedy death. He lived a year after that. His declarations manifested a prejudice against the plaintiff, without apparent cause, and not consistent with his former disposition towards her. Even after his conveyance of the land to the children, he made declarations indicative of a purpose to sell the property as though it were still his own.

We deem the case, only the principal features of which we have referred to, to have justified the finding of the trial Court that Mrs. Burch sought, by undue influence, to secure for herself and children all of her father's property during his lifetime, without consideration, and to prevent the plaintiff from receiving any part of it; that she was able to and did unduly influence him to that end, in procuring the execution of the deeds in question; and that, by reason thereof, such deeds were not executed as his free and voluntary acts. The relation of Mrs. Burch to the grantor; her desire to secure the property, with proof of some efforts directed to the accomplishment of that end; the opportunities arising from her living with him, and

from his dependence upon her care ; his age, mental condition, and infirmities ; the control which she exercised generally over his conduct ; the improvident and inequitable nature of the conveyances, not only impoverishing himself, but virtually disinheriting one of his two daughters ; the change in his disposition towards the plaintiff, and of his purposes respecting the disposition of his property ; and the value of the property thus disposed of,—may not have been sufficient to necessarily compel the conclusion that, in this matter, she had overpowered and subjected his will to her own, overbearing his own judgment and free will ; but these circumstances at least support and justify that conclusion of the trial Court, even though direct proof of the exercise of undue influence be wanting ; for the ultimate fact of undue influence, which is a species of fraud, may be established by circumstantial evidence: *Woodbury v. Woodbury*, 141 Mass. 329 (5 N. E. Rep. 275); *Drake's Appeal*, 45 Conn. 9 ; *Tyler v. Gardiner*, 35 N. Y. 559, 594.

The fact of undue influence having been established, it should be deemed to avoid the conveyance, not merely as to a grantee who has procured it by such means, but also, in the absence of a valuable consideration paid, as to innocent grantees not chargeable with such fault: *Huguenin v. Baseley*, 14 Ves. 273 ; *Whelan v. Whelan*, 3 Cow. 537 ; *Davis v. Calvert*, 5 Gill & J. 269, 302 ; *Harris v. Delamar*, 3 Ired. Eq. 219.

Order affirmed.

Swisshelm's Appeal, 56 Pa. St. 475 ; *Golding v. Golding*, 82 Ky. 51 ; *Boyd v. De la Montagnie*, 72 N. Y. 498 ; *Styles v. Styles*, 14 Mich. 72 ; *Taylor v. Taylor*, 8 Howard, 183 ; *Brown v. Burbank*, 63 Cal. 99 ; *Bowe v. Bowe*, 42 Mich. 195.

As to contracts made in contemplation of marriage, see *Rau v. Von Zedlitz*, 132 Mass. 264.

(b) As to parent and child.

JENKINS *v.* PYE.

Supreme Court of the United States.

12 Peters, 241.

THOMPSON, J. This case comes up on appeal from the Circuit Court of the District of Columbia, for the county of Alexandria. The appellees were the complainants in the Court below; and as heirs-at-law of their mother, Eleanor Jenkins, filed their bill, by their father, James B. Pye, as next friend, to set aside a deed given by their mother to George Jenkins, her father, bearing date the 15th of March, 1813. The bill charges that the deed was made wholly without consideration, and operated only to create a resulting trust in favor of the grantor and her heirs; and if their claim cannot be sustained on that ground, they charge that the deed was obtained by the undue influence of parental authority, and therefore void in equity, against the said Eleanor Jenkins and her heirs.

The consideration expressed in the deed is one dollar; and as to the allegation of undue influence, the bill charges that the said Eleanor inherited, as heir of her mother, the land conveyed to her father, and in which her father was entitled to a life estate. That at the time of her mother's death she was an infant of very tender years, residing with her father, and continued to reside with him until her marriage. That she never was informed of the extent of her property, to which she became entitled on the death of her mother; and having led a life of great seclusion in the country, at a distance from Alexandria, where the lands are situated, she had no means of acquiring information on the subject. That very soon after the said Eleanor had attained the age of twenty-one years, and whilst she still resided with her father, and remained in ignorance of the extent and value of her rights, the said George Jenkins, availing himself of his parental authority, and of the

habit of implicit obedience and submission on the part of his child, procured from her the deed in question.

The answers of the appellants deny every material charge and specification in the bill tending to show that any undue influence was exercised by the father to obtain the deed from his daughter, but that the act was voluntary and free on her part. That she was well acquainted with her rights and the value of the property. That at the time of executing the deed she was twenty-three years of age, and that the same was not done in expectation of her marriage, as she was not married for two years afterwards.

The mere nominal consideration expressed on the face of the deed was enough to pass the estate to the grantee, no uses being declared in the deed. It is true, as a general proposition, that he who pays the consideration means, in the absence of all rebutting circumstances, to purchase for his own benefit; and there may be a resulting trust for the use of the party paying the consideration. But this is founded upon a mere implication of law, and may be rebutted by evidence showing that such was not the intention of the parties. And in the present case the evidence is conclusive to show that no such resulting use was intended. But it is unnecessary particularly to notice this evidence, as this part of the case was not very much pressed at the argument. And in addition to this the evidence shows that on the 3d of November, 1813, the day her deed was offered for record in Alexandria, George Jenkins paid to his daughter two thousand dollars; which, under the situation of the property, might well be considered nearly, if not quite, an adequate consideration. The property being in a dilapidated state, requiring great expense in repairs; and the grantee, George Jenkins, having a life estate in it, which, from the circumstance of his living eighteen years after the date of the deed, there is reason to conclude that the state of his health and constitution was such at that time as justly to estimate his life estate of considerable value.

The evidence of the payment of two thousand dollars, in addition to the nominal consideration of one dollar mentioned in the deed, was admissible without any amendment of the

answer. It rebutted the allegation in the bill that the deed was made wholly without consideration.

But the grounds mainly relied upon to invalidate the deed were, that being from a daughter to her father, rendered it at least *primâ facie* void. And if not void on this ground, it was so because it was obtained by the undue influence of paternal authority.

The first ground of objection seeks to establish the broad principle that a deed from a child to a parent, conveying the real estate of the child, ought, upon considerations of public policy growing out of the relation of the parties, to be deemed void; and numerous cases in the English chancery have been referred to which are supposed to establish this principle. We do not deem it necessary to travel over all these authorities; we have looked into the leading cases, and cannot discover any thing to warrant the broad and unqualified doctrine contended for on the part of the appellees. All the cases are accompanied with some ingredient showing undue influence exercised by the parent, operating upon the fears or hopes of the child, and sufficient to show reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child; and in some cases, although there may be circumstances tending in some small degree to show undue influence, yet if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed.

It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject, for should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for that the deed of a child to a parent is to be deemed *primâ facie* void. It is undoubtedly the duty of Courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection; and acting on the

presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child. Whereas the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child, and is founded upon the same benign principle that governs cases of purchases made by parents in the name of a child. The *prima facie* presumption is that it was intended as an advancement to the child, and so not falling within the principle of a resulting trust. The natural and reasonable presumption in all transactions of this kind is that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected by keeping a watchful eye over the transaction to see that no undue influence was brought to bear upon it.

In the present case every allegation in the bill tending to show that any undue influence was used is fully met and denied in the answer, and is utterly without proof to sustain it. And indeed this allegation seemed to be abandoned on the argument.

But if any thing was wanting to resist the claim on the part of the appellees, and to establish the deed and the interest derived under it, it will be found in the lapse of time. The deed bears date the 3d of November, 1813, the grantor, Eleanor Jenkins, then being twenty-three years of age. She was married about two years thereafter, and died in the year 1818; and not a whisper of complaint was heard against the transaction during her lifetime. George Jenkins, the grantee, lived until the year 1831, and no complaint was made in his lifetime; after a lapse of eighteen years it is difficult, if not impracticable, fully to explain the transaction.

Lapse of time and the death of the parties to the deed have always been considered in a Court of Chancery entitled to great weight, and almost controlling circumstances, in cases of this kind.

But the circumstances as disclosed by the proofs not only

rebut every presumption of unfairness on the part of George Jenkins, but disclose circumstances tending to show that he was governed by motives highly honorable and commendable. He was a man of large estate; the property conveyed to him by his daughter was in a dilapidated and unprofitable condition. He had a life estate in it. And it would have been unreasonable, if not unjust to his other children, to have required him to incur great expenses in improving this property, which would enure to the exclusive benefit of this daughter. His object, as well as that of his daughter, seems to have been to enable him the more easily and satisfactorily to make an equal distribution of his property among all his children; as well the said Eleanor as those he had by a second marriage. This was a measure well calculated to promote harmony among his children; and his intention to carry that disposition of his property into execution was manifested by the will he made; which failed however of its full operation by reason of some informality in its execution. But the appellees have succeeded to a full and equal share of his estate under the distribution which the law has made, which is all that in equity and justice they could claim.

This view of the case renders it unnecessary to notice the points made on the argument in relation to the accounts which the appellees were called upon to render.

The decree of the Court below is accordingly reversed, and the bill dismissed.

Miskey's Appeal, 107 Pa. St. 611; Jenkins v. Pye, 12 Peters, 241; Berkmeier v. Kellerman, 32 Ohio State, 239; Brown v. Burbank, 64 Cal. 99.

FIDUCIARY RELATIONS.

(c) Guardian and ward.

WICKISER v. COOK.

Supreme Court of Illinois, 1877.

85 Ill. 68.

CRAIG, J. The questions presented by this record involve the consideration of a sale and conveyance of a tract of land by a ward to a guardian a short time after the ward attained majority. The mere fact that the relation of guardian and ward has existed will not preclude the making of contracts between the two after the guardianship has been closed and the accounts fully and fairly settled. After the fiduciary relation has terminated, and the influences which that relation would necessarily create have ceased to exist, no reason is perceived which would debar the parties from making contracts, which, if fairly and honestly made, based upon an adequate consideration, Courts may sanction and sustain.

In *Oleler v. Sansborn*, 2 Atk. 15, a question of this character arose, and LORD HARDWICKE said: In this case it was improper for a guardian to purchase his ward's estate immediately after his arriving of age; but, though it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside. Perry on Trusts, in discussing the question (sec. 200), announces the rule as follows: "While the relation actually subsists, no contracts can be made; but if a contract or conveyance is made by the ward to the guardian just after attaining his property, and before a full settlement is made, and while the influence of the guardian is in full force, Courts will examine in all its aspects; and the guardian claiming under such a conveyance must satisfy the Court that the transaction was fair and proper, and that it did not proceed from undue influence, or from any fear, hope, or any other unworthy motive induced in the mind of the ward by the conduct of the guardian."

In Reeve's Domestic Relations, p. 475, and note, it is announced, in clear and emphatic terms, that a valid contract may be made between guardian and ward shortly after the ward attains his majority, where it appeared a full consideration had been paid, and no undue influence had been exerted. In the cases which we have had occasion to examine, where contracts of this character have been set aside, it appeared in all of them that some undue influence had been exerted over the ward.

The question then arises, whether the sale in this case was made in conformity to the rule announced in the authorities cited. If it was, it may be sustained; otherwise, not. The appellant was appointed guardian in 1867, but he never made any report of his doings to the county Court. In September, 1871, appellee was of age. In June, 1872, she sold appellant the premises. The consideration named in the deed was \$1300, but appellee was paid but \$600. She was told by appellant that indebtedness amounting to \$700 was existing against the land, for which it was liable to be sold. She appeared to rely upon this statement made by her guardian, and under those circumstances she conveyed the land. When appellant obtained the possession of the land in 1870, it was incumbered for \$260, due a former occupant. This was the only debt, so far as is shown by the proof, which was a charge upon the land. Appellant obtained for the rent of the property, in 1870 and 1871, \$220, which was applied in payment of that indebtedness. When, therefore, the purchase was made, the land was incumbered for only a balance of \$40. It may be true that appellee was indebted to appellant for advances made by him as guardian; but his account, whatever it was, had not been presented to the county Court and approved, and until that had been done, it could not be regarded as a charge upon the property.

The appellee was, therefore, induced to make the conveyance under a clear misapprehension of the facts, induced by one upon whom she had a right to rely.

There is a conflict in the evidence as to the real value of the land, and we are not prepared to say, in view of all the evidence upon that point, that it was, in fact, worth more than \$1300,

the consideration named in the deed ; and did no other question arise than inadequacy of consideration, the sale might be sustained. But appellant had no right to mislead his ward in regard to the real condition of the property, or purchase for less than its true value, or withhold any part of the consideration. At the time the sale was consummated, in June, 1872, the property was leased for \$110 for that year, and if it be true appellant had made advances, as guardian, for appellee, the rents of the land would, in a short time, have been sufficient to liquidate all sums advanced. The necessity, therefore, for a sale of the property, which appellant held out, did not exist. Under such circumstances, a Court of Equity can not sanction the sale, and the decree of the Court setting it aside was correct. But, under the decree, the Court required the complainant to refund only \$432 of the purchase-money received. We do not fully comprehend the principle upon which that amount was arrived at. When the complainant comes into a Court of Equity and asks to have a sale which she has made set aside, equity requires that she should, before obtaining the relief, return the amount of money she received. When she seeks equity she must do equity. It would not be equitable to restore to her the property, and at the same time allow her to retain the consideration-money which she received for the land.

The appellant, as we understand the proof, actually paid on the purchase of the land \$646.35. This amount should have been returned, or the land ordered sold to satisfy the same, as a condition upon which the sale should be cancelled.

The other account of appellant, amounting to \$646.42, which was claimed to be the balance of the consideration for the land, can not be allowed him in this proceeding. The items composing that account should have been submitted to the county Court for the approval or rejection of that tribunal. He has made no settlement with the county Court as guardian, and as this account embraces items that relate exclusively to his doings as guardian, we know of no reason why he should not render a final account, and the Court, on that settlement, can allow or reject such portion of the account as the evidence may warrant.

The decree will be reversed, and the cause remanded, with directions to enter a decree in conformity with this opinion.

Decree reversed.

Ashton v. Thompson 32 Minn. 25 ; *Wade v. Pulsifer*, 54 Vermont, 45.

(d) Attorney and client.

JENNINGS et al. v. McCONNELL et al.

Supreme Court of Illinois, 1855.

17 Ill. 148.

SCATES, C. J. The bill sets forth facts which give the Court of Chancery jurisdiction on two different grounds of subject-matter. In the relation of client and attorney or solicitor, there is that confidence reposed in the latter which gives rise to very strong influence over the actions, rights, and interests of the former. Hence the law, with a wise providence, not only watches over all the transactions of parties in this relation, but often interposes to declare transactions void which, between other persons, would be good. And this is applicable to contracts or gifts generally, while the confidential relation continues, and is not confined to particular property about which the attorney may have been employed. It is not required that a client should establish fraud or imposition—the *onus* of proof—upon showing the relation when the contract or gift was made, is upon the attorney to show fairness, adequacy, and equity ; and upon failure to make proof, Courts of Equity treat the case as one of constructive fraud. The highest degree of good faith and fairness is expected and exacted. Story Eq. Juris., secs. 310 to 313 and notes, contains a general and correct summary of the law of this relation. The demurrer here admits the employment as attorney, the conveyance absolute in fact, but as a security of indemnification, and that the liability has been released without damage ; and yet the property has been sold in violation of the object for which it was conveyed. And now the attorney refuses any account.

Again: a second ground of equity jurisdiction is the general power of Courts of Equity in matters of administration, concurrent with the county Courts in many respects, and to a larger extent in general, as embracing trusts, equitable assets, marshalling assets, and especially in matters regarding the realty, matters of discovery, fraud, and in the payment of legacies and distribution of the surplus: Story Eq. Juris., secs. 530 to 545.

County Courts have ample powers to carry out the ordinary matters of administration and settlement, but will find none to reach the equitable features of trust in relation to the condition of this realty, nor of the equitable relation between the defendants and the intestate. The parties in interest will find that relief to which they are entitled in a Court of Equity.

The allegations of this bill show that there was no intention of selling this land, or converting it into personalty, except upon a contingency, which has not happened; that was the necessity to save defendant, demurrant, harmless as bail. The actual sale, contrary to that intention, will not change the character of the proceeds. They will be regarded still as realty, and as such descend to the heirs, and do not go to the administrator, except upon petition and decree for payment of debts. The heirs and widow are therefore the proper persons to sue, and it needs no administration to reach this question.

The Court will, upon taking jurisdiction of the transaction, investigate and decree upon the whole, embracing the personalty, and, if need be, subject it to a due course of administration. The suggestion that there are no debts and no other estate, might deserve the serious consideration of this Court for its interference, were there no other ground for coming here instead of the county Court for administrations. But the jurisdiction in this case does not depend upon the general powers of the Court to overstep an administration, and we waive its discussion and determination. The defendant, demurrant, should have answered or pleaded to the merits.

There appears to be a full answer from the other defendant, English. But the cause seems to have been dismissed generally, on the demurrer or motion, for want of cost bond, without any determination or even investigation on the issue tendered by

the bill and answer. Complainants were not allowed opportunity for issue and proofs.

The decree is therefore erroneous as to both ; for issues should have been formed and tried, and, if warranted by the evidence, an account directed.

Decree will be reversed, and cause remanded.

Decree reversed.

Ryan Bros. v. Ashton, 42 Iowa, 365.

(e) Trustee and beneficiary.

SPENCER AND NEWBOLD'S APPEAL.

Supreme Court of Pennsylvania, 1876.

80 Penn. St. 317.

MERCUR, J. In the lifetime of Nathan Smith, he was entitled to an undivided one-twelfth part in certain coal lands. The legal title to the land was in John L. Newbold and William M. Spencer. The widow of Smith filed this bill, alleging that Newbold, acting for himself and Howard Spencer, fraudulently procured from her, and from the heirs of her late husband, a conveyance of this interest in the lands. The Master found the allegations to be true. The Court sustained the finding. Thereupon, *inter alia*, it decreed a transfer to Mrs. Smith of the property in its changed form, on the payment to Howard Spencer of the sum which he and Newbold had paid, with interest. From this decree each party appealed.

The controlling questions for consideration are, whether Newbold held the property in trust at the time of procuring this conveyance, and, if so, did he conceal from Mrs. Smith the true condition of the title and property to such an extent as to be guilty of fraud in its procurement ?

In 1836, five tracts of land, situate in Luzerne County, were conveyed to William M. Spencer and said Newbold, in trust as to certain undivided twelfth parts or shares thereof, for the use and benefit of themselves and of several other persons therein

named, and *inter alia* two-twelfths thereof for said Nathan Smith. A proviso in the deed authorized said trustees at any time, on the request in writing of a majority in number and in trust of the *cestuis que trustent*, to sell and convey the premises discharged of the trust, and to divide the proceeds among the *cestuis que trustent* in the proportion in which they held the shares in the land. Thus Newbold assumed all the duties and obligations of a trustee at the inception of the title.

Subsequently these shares or twelfths were the subject of sale and purchase. Nathan Smith bought and sold several shares. Finally, in 1841, he appears to have been the owner of one share or twelfth only. He died in 1849.

In 1854, The Black Creek Improvement Company, one of the defendants below, was incorporated by an Act of the Legislature. John L. Newbold was therein named as one of the incorporators. By deed of 22d January, 1855, Spencer and Newbold, said trustees, conveyed to said company defendant three of said tracts of land, being all that remained unsold, having been authorized and required so to do by a majority in number and in trust of the *cestuis que trustent* in the property. In May of the same year, certificates of shares of full-paid stock were directed by the company to be issued to the owners of eleven-twelfths of the property, and 3500 shares of the stock to be delivered to William M. Spencer and John L. Newbold, trustees, for the owner or owners of the remaining one-twelfth. In July, 1869, Mrs. Smith notified the company "not to issue the stock to any but herself and the heirs of Nathan Smith, deceased." Nevertheless, in February, 1870, the company did issue certificates for these 3500 shares of stock to William M. Spencer and John L. Newbold.

The agreement of purchase from Mrs. Smith was made in February, 1869, and consummated by deeds made in the same month, and in the month of March following.

In the years 1869, 1870, 1871, and 1872 the company declared dividends in the aggregate of 22 per cent., or \$2.20 per share.

It is claimed, however, by the defendants in the bill, that Newbold did not hold this share in trust at the time of his purchase from Mrs. Smith. It is alleged that he was then the owner in his own right by virtue of a purchase made by him

in 1841, of Nathan Smith. The Master thus far sustained this allegation as to find that Newbold did purchase by parol at the time alleged and paid the purchase-money.

Although the fact of purchase is stoutly denied, yet we do not see sufficient evidence to reverse this finding. We therefore assume it to be correct. But the Master further found that Nathan Smith did not execute any deed or instrument of writing conveying the same.

This finding of fact is alleged for error inasmuch as in Newbold's answer he distinctly avers he had received a written title from Nathan Smith for the share in dispute; that the answer was distinctly responsive to the bill, and it had not been contradicted by any witness of the plaintiff in the bill.

If the case rested on the bill and on the answer of Newbold alone, or if his subsequent testimony had not contradicted his answer, there would be great force in this defence so far as it applied to himself. The answer, however, would not have availed Spencer, who had no knowledge of the alleged purchase, except what he received from Newbold, and answered on information and belief only. Besides, in the deed from Newbold to Spencer of the 1st of February, 1869, conveying this one-twelfth share to the latter, it is distinctly averred, "whereas the said Nathan Smith died without executing to me a deed for the said one-twelfth share or interest."

It is a significant fact that this deed bears the same date as the contract between Spencer and Mrs. Smith, which by a more general description included the same share. Thus it clearly appears that Spencer accepted a conveyance from Newbold of the land in question under an express declaration that Nathan Smith had never executed a deed for said premises. As further evidencing the knowledge of the parties to the conveyance, and fully to protect Newbold, he therein declared "nothing herein contained shall be construed so as to render me liable to make good the title to the premises hereby granted, but only to transfer to the said Howard Spencer all my right, title, and interest therein."

On testifying before the Examiner, April 18, 1887, Newbold said, "I believe he made me a deed for it; I had searched for that deed for years; I have never been able to find it." On a

further examination, May 29, 1872, he answered: "I do not know that I ever had a deed; I am strongly impressed that I had." Then to the question, "Who wrote the deed which you say you are impressed you had for the share in dispute?" he answered, "I don't know that any deed was ever written, and of course can't say who wrote it; I have no recollection on the subject."

Thus, as a witness, he frittered away on this point all certainty in his answer as a party. If, when subjected to the test of an examination, he could not swear that he ever had a deed, nor that he had ever seen one, nor that one was ever written, and that he had no recollection on the subject of a deed, it is very clear the Master was correct in finding the evidence insufficient to prove the execution and delivery of a deed. We may concede the correctness of the remark made by Chancellor GREEN in *Brown v. Buckley*, 1 McCarter (N. J.), 295, as to the general effect of the answer; yet here Newbold, the witness, substantially impeached and overthrew the answer of Newbold, the party.

The positive declaration made in his deed, under seal, some two years before his answer, harmonized with his solemn oath, made nearly two years after his answer. When a party is permitted to testify, and does testify in conflict with his answer, it will not do to hold that his testimony shall be disregarded and his answer stand wholly unimpeached. Precisely how far the rule should be modified, now that a party may be a witness in his own behalf, it is not necessary at present to indicate. We see no reason to dissent from the conclusion of the Master, that no deed was ever executed by Nathan Smith for the share in question.

Nor do we discover any error in his conclusion that no such exclusive possession was taken by Newbold in pursuance of the contract as to take the case out of the Statute of Frauds. As trustee before the sale he paid the taxes on the land. They were unseated and no one was in actual possession. He merely continued to pay the taxes as before. No change of possession was taken in consequence of his purchase. Payment of the purchase-money alone is insufficient to take the case out of the statute. At most, however, this was a purchase by one tenant

in common of the interest of his co-tenant. There can be no valid parol sale of lands among tenants in common possession, as there cannot be any such delivery of possession as will take the case out of the statute: *Workman v. Guthrie*, 5 Casey, 495; *Chadwick v. Felt*, 11 Id. 305; *Hill v. Meyers*, 7 Wright, 170; *McCormick's Appeal*, 7 P. F. Smith, 54. Nor was there any such actual, hostile, continued and exclusive possession in Newbold, as to give him title under the Statute of Limitations.

It therefore follows that at the time of his purchase from Mrs. Smith he had no right to this share which he could enforce at law or in equity against the heirs of Nathan Smith. He held the share as land in trust for them, until the sale to the company. Thenceforth he held the stock and proceeds thereof in like manner. *Primâ facie*, the purchase of a trustee from his *cestui que trust* cannot stand. To sustain it the trustee must have acted in entire good faith. He must show that he made to the *cestui que trust* the fullest disclosures of all he knew in regard to the subject-matter, and that the price he paid was adequate: *Coles v. Trecothick*, 9 Vesey, 234; *Randall v. Errington*, 10 Id. 423; *Greenfield's Estate*, 2 Harris, 489; *Diller v. Brubaker*, 2 P. F. Smith, 498; *Wistar's Appeal*, 4 Id. 60; *Parshall's Appeal*, 15 Id. 224.

A reference to the evidence shows that Newbold did not inform Mrs. Smith that he had ever held this property in trust for her late husband; nor that he had purchased it from Mr. Smith; nor that he and William M. Spencer had conveyed it to the Black Creek Improvement Company, and had received in payment therefor stock of large value; nor that coal mines were being worked on the land, and that a cash dividend had been declared on the stock. It is true he did say to her that Mr. Spencer had some valuable coal interests in land which he (Newbold) and Mr. Smith had formerly owned, and he was desirous of removing some doubts about his title; that he wanted to get quit-claim deeds from her and from the heirs of her husband, and her release of dower, for which he would pay something.

He then withheld the substantial facts, which would have shown that she and the heirs of her late husband had a clear

right to the property and its great value. His whole language was manifestly intended to convey, and did convey to Mrs. Smith, the idea that their interest was small and of uncertain value. At this time she was past eighty-six years of age. The vigor and strength of her mind were impaired. She possessed limited means; hence the persuasive kindness of Newbold to pay her money so soon was well calculated to prevent suspicion, and cause her to refrain from making inquiries of others. She was thus induced to procure for Spencer the title of the heirs, and transfer her own and all for not more than one-seventh of its value. Spencer knew by the quit-claim deed which he received from Newbold that Smith had executed no deed for the lands. In making the contract with Mrs. Smith, Newbold acted for both Spencer and himself. Each had full knowledge. Both were interested in the stock issued for this share. Spencer therefore stands on no higher ground than his agent and co-partner. Substantially the same concealments and suggestions procured the deeds from the heirs. Manifestly such a purchase cannot be sustained in equity. It is unnecessary to discuss all the collateral questions in detail. We see no error in the conclusion of the Master nor in the decree of the Court.

Decree affirmed, and the appeal of each party is dismissed at the cost of the appellant therein.

Jones v. Lloyd, 117 Ill. 597.

As to the influence of spiritual advisers, see *Marx v. McGlynn*, 88 N. Y. 357.

Spiritualistic medium : *Connor v. Stanley*, 72 Cal. 556.

Physician and patient : *Audenreit's Appeal*, 89 Pa. St. 114 ; *Woodbury v. Woodbury*, 141 Mass. 329.

So whenever special confidence exists contracts made under its influence will be closely scrutinized by the Courts : *Smith v. Kay*, 7 H. L. Cases, 750 ; *Leighton v. Ore*, 44 Iowa, 679 ; *Hanna v. Wilcox*, 53 Id. 547.

(f). Mental weakness.

RIDER v. MILLER.

Court of Appeals, New York, 1881.

86 N. Y. 507.

MILLER, J. There was certainly strong evidence upon the trial of this case to show that the deed executed by the grantor to the defendant was not his free act and deed. He was at the time over seventy years of age, and the evidence clearly establishes that from a vigorous and strong man he had become weak and feeble *physically*; that his mind was impaired so that he was unable to attend entirely to his own business affairs, and that he required the assistance of others in matters of importance. His memory was failing, and on many occasions, as the proof showed, he was unable to properly care for his own interests and rights. He executed the deed to the defendant and denied that he had done so. Although he had declared that he intended to give his farm to the defendant at different times, he had also declared differently upon other occasions, and said that his nephews and nieces stood alike to him, and should share his property equally. It thus appears that his purpose in this respect was not a settled one, and from the circumstances presented he was precisely in that condition when he was liable to become the victim of fraud, imposition, or undue influence. The proof shows that the defendant employed Andrew Schooley, who lived adjoining the grantor's farm, to whose house he was in the habit of going frequently, and with whom he was on intimate terms, to procure a deed conveying the farm to him, and agreed to pay him therefor the sum of \$1000. Schooley procured the deed to be drawn by an attorney, without the knowledge of any other person, giving instructions in regard to the terms, brought the attorney with the deed to his own residence, then brought the grantor there, and the deed was then signed and acknowledged before the attorney, who was a notary. The deed conveyed the farm, reserving a life-

estate to the grantor, and provided that the defendant should pay \$500 to each of his sisters. The grantor, after returning home, upon inquiry, stated that he had signed no paper in regard to his own affairs, but had done a little neighborly business; and, when questioned afterward, emphatically denied that he had signed a deed. About fifteen months after the deed was executed the grantor in proceedings *de lunatico inquirendo* was adjudged to be a lunatic. These facts were uncontradicted; and the deed was executed secretly, with no relative present and under circumstances extremely suspicious. The evidence does not show that this was done at the suggestion of the grantor, in pursuance of a prior declared intention or as a voluntary act, but that it was procured by Schooley under a promise of being paid a large sum of money. In view of the facts, with no explanation given, every intendment is against the validity of the deed. If the grantor had executed such a conveyance of his own free will, without the intervention, or pressure, or influence of an intimate friend, and with no consideration to be paid for such intervention, it might be upheld. It was in the power of the defendant to rebut the inference to be derived from the facts stated, and we think, as the case stood, it was incumbent upon him to prove that the transaction was without fraud or undue influence, and correct and fair. The defendant and Schooley, who knew all about it, were not sworn as witnesses and gave no testimony. The defendant made no explanation of his conduct or of Schooley's interference, and remained silent upon the trial when he should have spoken, and these facts, we think, bear very much against the defendant and tend to strengthen the plaintiff's case. *Prima facie*, the influence brought to bear was of a character to induce one whose mind was affected and impaired to yield improperly to the importunity or the will and dictation of another as the controlling power. This we think was undue and improper influence within the meaning of the decisions. The exercise of undue influence need not be shown by direct proof, but may be inferred from circumstances, although they must be such as to lead justly to the inference that undue influence was employed, and that the instrument which was executed did not express the real wishes of the person who signed it: *Brick v.*

Brick, 66 N. Y. 144. The deed in question would not have been given without the intervention of the defendant by the employment of Schooley, under the promise of a large pecuniary reward, entirely disproportionate to the services rendered, and the conclusion is irresistible from the evidence that undue influence was exercised in procuring the conveyance. Under the circumstances the finding of the Judge upon the trial, that the grantor was controlled and directed by undue influence exercised by Schooley, and that the conveyance and its execution were not his free act and deed, is supported by sufficient evidence.

We think that there was no valid objection to the testimony of several witnesses, sworn upon the part of the plaintiff, as to their impressions derived from specific acts and conversations of the grantor at different times, that is, that were irrational, and within the authorities evidence of this character under the circumstances was properly received.

The inquisition of lunacy was also competent and *prima facie* evidence that at the time it was taken the grantor was not competent. To this extent and no more it was material, and whatever inference is to be derived therefrom prior to that time was a subject for consideration by the trial Court.

The judgment was right, and should be affirmed.

All concur.

Judgment affirmed.

Oard v. Oard, 59 Ill. 46 ; Moore v. Moore, 56 Cal. 89 ; Allore v. Jewell. 94 U. S. 506-11.

NECESSITIES.

(g) Party influenced.

HOUGH v. HUNT.

Supreme Court of Ohio, 1826.

2 Ohio, 495.

BY THE COURT. From the evidence in this case it is manifest that, at the time of the contract for the sale of the land in

question, the vendor knew that the purchaser was in some degree embarrassed. It is also fully proved that the land was not worth half the price that Hough agreed to pay for it. The circumstances of the case are altogether extraordinary. Hough is hard pressed for the sum of two thousand five hundred dollars. He applies to Hunt for a loan of that sum. He obtains it, and an engagement that the lender will loan him seven thousand five hundred dollars more upon good security. But at the same time that the twenty-five hundred is borrowed, and a contract made for a further loan, a contract of sale is made for a tract of land at eleven thousand nine hundred and seventy-five dollars, being more than double its real value, two thousand three hundred and twenty-five dollars of which, with the money actually loaned, is secured upon other property than that sold.

The mind revolts at the idea that a man so embarrassed would, to obtain the loan of two thousand six hundred dollars, voluntarily embarrass himself further by creating a new debt of eleven thousand nine hundred and seventy-five dollars for property not worth half that sum. It is impossible that the vendor, who also made the loan, was not sensible that he was taking advantage of the purchaser's necessity. The imprudence of the proceeding on the part of Hough was so gross that it could justly be attributed to no other cause.

It is not in proof that Hunt knew the extent of Hough's embarrassments. But he knew that he was in necessity to some extent; of that necessity he must have been sensible he took advantage in exacting the contract for the sale of the land. The wish to obtain further loans and the agreement to make them, with the subsequent escape from performing that agreement, are strong circumstances in confirmance of the fact that Hunt knew Hough's situation and acted upon it.

One peculiar hardship of the case is that upon account of this unconscionable contract Hunt has fastened a part of the purchase-money upon Hough's other lands, sweeping from previous creditors that which their means had supplied, and retaining to himself the whole consideration which his contract was supposed to advance.

The rule in chancery is well established. When a person is encumbered with debts, and that fact is known to a person

with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve upon account of the advantage and hardship. Where the inadequacy of price is so great that the mind revolts at it, the Court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract. So, when a person borrowing money to relieve his necessities is induced to purchase property at an exorbitant price, and to an amount greatly beyond the loan obtained, and secure the payment by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, is sufficient evidence of unfair advantage to justify the interference of the Court. We consider this a case of great exorbitancy of price, where the purchaser was deeply embarrassed, and where the vendor availed himself of that embarrassment to exact the bargain. We are therefore of opinion that the contract of purchase be rescinded, and that the mortgage remain a lien only for the money loaned and interest.

Kelley v. Caplice, 23 Kansas, 337 ; *Boynton v. Hubbard*, 7 Mass. 112 ; *Parsons v. Ely*, 45 Ill. 232.

MISREPRESENTATION.

Misrepresentation of a material fact innocently made by one party to a contract, which is believed and reasonably acted upon by the other to his injury, so far affects the validity of the contract that the injured party is entitled to relief, either by rescission of the contract or by a recoupment in a suit brought to enforce it.

MULVEY v. KING.

Supreme Court of Ohio, 1883.

39 Ohio St. 491.

UPSON, J. The facts alleged in the amended answer not having been put in issue by a reply, and having also been fully

proved by the testimony, the Court of Common Pleas must have decided that the facts did not constitute a defence nor counter-claim. The representation that the tract of land purchased included a piece more valuable than that actually conveyed, on account of its being of better quality, and having on it timber and a building of some value, was certainly a material representation, and if made falsely or fraudulently would, without doubt, constitute a good cause of action for the damages sustained by a person who was by means thereof induced to purchase the property.

In the case of *Allen v. Shackelton*, 15 Ohio St. 145, it was held that the purchaser might set up, as a defence to a suit upon the note and mortgage given for the purchase-money, a counter-claim for damages for fraud practised in the sale of the premises by the vendor, by means of representations similar to those which were made by King to Mulvey; but that was a case of actual fraud.

In the case of *Taylor v. Leith*, 26 Ohio St. 428, which was an action brought to recover damages for fraudulent representations in the sale of lands, it was held that the instruction given by the Court of Common Pleas was calculated to mislead the jury, by giving them to understand that the representations which were untrue in fact would give a cause of action, although they may have been founded in mere mistake; and, in the opinion of the Court, WHITE, J., says: "The present action is brought to recover damages for fraud or deceit practised in the sale of land. To constitute a cause of action there must be bad faith. If the representations, when made, were believed to be true, and the facts of the case were such as to justify the belief, there is no fraud or deceit, and there can be no recovery."

In the case of *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283, it was held that an action would lie for a false representation of a material fact, whether the party making it knew it to be false or not, if he had no reason to believe it to be true, and it was made with the intention of inducing the person to whom made to act upon it, and he did so, sustaining a damage in consequence. The principle upon which a person is held liable for damages in such a case is, that one who causes damage to

another by inducing him to act upon representations false in fact, and which the person making them has no reason to believe to be true, is guilty of such gross negligence as in law is regarded as a fraud.

It may be considered as well settled in this State, by the cases above cited, that an action for damages caused by misrepresentation cannot ordinarily be maintained without proof of actual fraud, or such gross negligence as amounts to fraud. When, however, a person claims the benefit of a contract into which he has induced another to enter by means of misrepresentations, however honestly made, the same principles cannot be applied. It is then only necessary to prove that the representation was material and substantial, affecting the identity, value, or character of the subject-matter of the contract; that it was false; that the other party had a right to rely upon it, and that he was induced by it to make the contract, in order to entitle him to relief either by rescission of the contract or by recoupment in a suit brought to enforce it.

In this case it is fully proved that the representations made materially affected the identity and value of the property sold; that they were made for the purpose of inducing Mulvey to make the purchase; that he believed them to be true, and therefore bought the property, which he would not otherwise have done, and that they were false. But the testimony also fully proves that King was guilty neither of fraud nor of gross negligence in making those representations, his mistake having been occasioned by that of a surveyor in previously establishing the boundary line.

The facts thus proved bring the case within the principles above stated, and give a right of recoupment in an action for the balance of the purchase-money to the extent of the deficiency in the value of the property purchased. The rights of the purchaser do not rest upon the ground of fraud, actual or constructive, but that, to the extent of the difference in value between the property as it was represented to be and the property conveyed, there is no consideration for his promise. He cannot, upon any principle of law or equity, be compelled to pay for what the vendor did not own, and could not convey. The maxim *caveat emptor* does not apply to such representa-

tions as were made in this case, upon which the purchaser under the circumstances had a right to rely, and in reference to which he was guilty of no negligence.

Judgment of the District Court and Court of Common Pleas reversed, and cause remanded.

SMITH ON CONTRACTS, 244.

Brooks v. Hamilton, 15 Minn. 26 ; *Baughman v. Gould*, 45 Mich. 481 ; *Wickham v. Grant*, 28 Kansas, 370 ; *Mitchell v. McDougall*, 62 Ill. 498.

The misrepresentation must be of such a "character as to destroy the consent necessary to the validity of the contract:" 15 Minn. *supra* ; *Tuck v. Downing*, 76 Ill. 71 ; *Slaughter v. Gerson*, 13 Wall. 379.

So a *non-disclosure* of a fact material to the contract by one whose duty it is to disclose it, by reason of the fiduciary or confidential relations he sustains to the other party, will vitiate the contract.

BURRITT v. THE SARATOGA, ETC., INS. Co.

Supreme Court of New York, 1843.

5 Hill, 189.

BRONSON, J. In the law of insurance a representation is not a part of the contract, but is collateral to it. An express warranty is always part of the contract, and a reference in the policy to a survey or other paper will not make such paper a part of the contract, so as to change what would otherwise be a mere representation into a warranty: *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72 ; *Snyder v. Farmers' Ins. Co.*, 13 Id. 92, and s. c. in error, 16 Id. 481 ; *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall, 589 ; 1 Marsh. Ins. (Condy) 846-350, 451 ; 1 Phil. Ins. 346, 7, ed. of '40.(a) But these cases admit, what no one could well deny, that the policy may so speak of another writing as to make it a part of the contract, although not act-

(a) Further, as to the distinction between a *representation* and a *warranty*, see *Alston v. The Mechanics' Mutual Ins. Co. of Troy*, 4 Hill, 329, 334 *et seq.*, and the books there cited by WALWORTH, Chancellor.

ually embodied in the policy. And to that effect see *Routedge v. Burrell*, 1 H. Black. 254; *Worsley v. Wood*, 6 T. R. 710; *Roberts v. Chenango Ins. Co.*, 3 Hill, 501. Now here the policy not only refers to the plaintiff's written application "for a more particular description" of the property insured, but it refers to it "*as forming a part of this policy.*" The application was thus, by express words, made part and parcel of the contract, and the two instruments must be read in the same manner as though they had been actually moulded into one.

How then stands the question of warranty? The plaintiff was required by the "conditions of insurance" and by the form of application with which he was furnished to state the "relative situation [of the store] as to other buildings—distance from each, if less than ten rods." To this he answered by mentioning five buildings as standing within the ten rods. Although he did not in terms say there was no other building within the ten rods, he must have intended that his answer should be received and understood by the company as affirming that fact; and as the answer is to be regarded as parcel of the contract, I find it difficult to resist the conclusion that the plaintiff has *agreed* that there were no other buildings within the ten rods than those mentioned in the application. Men are not at liberty to put a different construction upon their language when the contract is to be enforced from that in which they intended the words should be received by the other party at the time the contract was made.(b) I am strongly inclined to the opinion that there was a warranty; but there is another feature in the case which renders it unnecessary to settle that question.

In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness, or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined or would have made upon different

(b) See *Potter v. The Ontario and Livingston Mutual Ins. Co.*, *ante*, pp. 147, 149.

terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy: *Bridges v. Hunter*, 1 Maule & Selw. 15; *Macdowall v. Fraser*, Doug. 260; *Fitzherbert v. Mather*, 1 T. R. 12; *Carter v. Boehm*, 3 Burr. 1905; *Bufe v. Turner*, 6 Taunt. 338; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535; *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359; 1 Marsh. Ins. (Condy) 451-453, 465; 1 Phil. Ins. 214, 303. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk. See 1 Phil. Ins. 284, 285, ed. of 1840. It is not necessary for the purpose of avoiding the policy to show that any fraud was intended. It is enough that information material to the risk was required and withheld.

This doctrine is fatal to the present action. The plaintiff was plainly and directly called upon to state the relative situation of the store as to all other buildings within the distance of ten rods; and he omitted to mention several buildings which stood within that distance, and among the number was one which was far more hazardous than that to which the policy applied. If there could be any doubt that the facts concealed

were material to the risk, the question should have been left to the jury.(c)

But there is a further view of the case which is still more decisive against the action; and it is one in which the materiality of the concealment is not open for discussion. The plaintiff was required by the conditions annexed to the policy, and by the printed form of application which he used, to give the information which he withheld. And it was one of the "conditions of insurance" that if he should "make *any* misrepresentation or *concealment* in the application" the policy should be "void, and of no effect." Nothing is said about fraud; but *any* concealment in the application avoids the policy. And yet the jury was instructed that there must be a *fraudulent* concealment of facts. That position cannot be maintained without making a new contract for the parties.

A warranty by the assured in relation to the existence of a particular fact must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject. See the cases already cited, and *Fowler v. Ætna Ins. Co.*, 6 Cowen, 673, and 7 Wend. 270, s. c.; 1 Phil. Ins. 351, 354. Here the parties have by their contract placed a misrepresentation or concealment in relation to particular facts upon the same footing as a warranty. They have agreed that the misrepresentation or concealment shall avoid the policy, and we have nothing to do with the inquiry whether the fact misrepresented or concealed was material to the risk. The jury should have been instructed to find a verdict for the defendants.

The Chief Justice and COWEN, J., being members of the company, gave no opinion.

New trial granted.

N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co., 17 Wendell, 359; *McLanahan v. Ins. Co.*, 1 Peters, 170-185; *Baker v. Humphrey*, 101 U. S. 502; 1 May on Insurance, § 202, note.

(c) See *Grant v. The Howard Ins. Co.*, *ante*, p. 10.

FRAUD.

The *assent* necessary to a valid contract must be procured by honest means. If procured by fraud in any of its forms, the contract may be avoided by the party upon whom the fraud was practised or by his legal representatives.

Fraudulent representations.

MERWIN v. ARBUCKLE.

Supreme Court of Illinois, 1876.

81 Ill. 501.

WALKER, J. The evidence in this case is conflicting, and it was for the jury to reconcile it, and find according to its weight, under proper instructions, and it was such a case as required that the law should have been clearly and fairly stated to the jury in the instructions.

Plaintiff in error insists that the Court committed manifest error in giving the instruction for defendant in error. He insists that the instruction ignores the *scienter* in a false representation to make it fraudulent. A careful examination of the instruction, we think, fails to disclose any ground for the criticism. The jury are informed that if plaintiff in error falsely and fraudulently represented that it was splendid, high, rolling land, and that 160 acres was good prairie, and the remainder was timber land, covered principally with walnut trees, and there were 100 bearing pecan trees on the timber land, etc., and the representations were false, then the jury should find for the plaintiff.

To render a representation fraudulent it must be false, and not only so, but the party making it must know that it is false. To recover in an action for deceit the statement must be untrue, the party making it must know that it is false, and the person

seeking to recover must have relied on the statement as true, and have been induced to act upon the statement; and the statement to authorize a recovery must have been in relation to a matter material to the transaction. See *Wheeler v. Randall*, 48 Ill. 182; *Hiner v. Richter*, 51 Id. 299.

As a general rule, representation as to mere value, although known to be false, will not constitute fraud: *Banter v. Palmer*, 47 Ill. 99. But this instruction requires all the other representations to be proved false, as well as the representation as to what plaintiff in error represented he had paid for the land. And even if that representation was not alone sufficient to constitute fraud, it did plaintiff in error no injury, as proof of its falsity was superadded to the other representations. It increased the burden of proof on defendant in error. Had the instruction been in the alternative, as to proof of the falsity of the representations, then a very different question would have been presented for consideration.

But as the *scienter* enters into and is necessary to a fraudulent representation, the instruction virtually informed the jury that the representations must have been made knowing them to be false. Then, when they were informed that they must have been fraudulent, they were, in substance, told they must have been not only false, but plaintiff in error knew it. We, therefore, fail to perceive that there was error in the giving of this instruction. Plaintiff in error had the right to ask instructions explaining it to the jury, and he availed himself of the privilege.

It is urged that the case of *Mitchell v. McDougall*, 62 Ill. 498, announces the rule that it does not matter whether the untruth of the statement by the vendor was known to him at the time or not, as the effect on the purchaser was the same in any event. In that case the vendor had been on the land, and must have known that the statements he made were untrue. Hence it was wholly unnecessary to the decision of the case so to state the rule. It was inadvertently made, and was not intended to overrule or modify the rule as previously announced by the Court.

It is next urged that the Court below erred in not permitting

plaintiff in error to prove that Taylor had made the same representations to him which he made to defendant in error.

As plaintiff in error had never seen the land in Missouri, it was material that he should have been permitted to prove that Taylor, who had previously owned the land, had described it to him as he described it to defendant in error. It would have tended to show that plaintiff in error did not make the statement recklessly and without foundation, or that he had fabricated the representations. It would have tended to show the animus with which they were made, and, as fraud consists largely of intention, this evidence was proper, and should have been admitted. If Taylor made the same statements to plaintiff in error, and he believed them, and had not been informed to the contrary, then it would be difficult to see in what manner he committed a fraud on defendant in error.

For the error in refusing to admit this evidence the judgment of the Court below must be reversed, and the cause remanded.

Judgment reversed.

SMITH ON CONTRACTS, 243.

To the same point.

HUMPHREY v. MERRIAM.

Supreme Court of Minnesota, 1884.

32 Minn. 197.

MITCHELL, J. This was an action for damages for deceit in the sale of stock of the Florence Mining Company. The deceit consisted, as alleged by plaintiff, in the false and fraudulent statements of one Carver, defendant's agent, who made the sale, as to the value, condition, and productiveness of the company's mine, and as to the amount of its indebtedness. Assuming that the alleged representations were made, and that they were untrue (of which facts there was competent evidence), and that they were material (which some of them undoubtedly were), it

was incumbent on plaintiff in such an action also to prove (1) that they were *fraudulently* made; and (2) that he believed them, and relied on them in making the purchase. *Deceit* is the type of fraud, and an *intention to deceive* is a necessary element or ingredient. False representations do not amount to a fraud at law in such case unless they be made with a *fraudulent intent*. Of course, to constitute a fraudulent intent it is not necessary that the party knew them to be false. The intent to deceive may be shown in either of three ways: (1) That the party knew his statements to be false; or (2) that, having no knowledge of their truth or falsity, he did not believe them to be true; or (3) that, having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge. In the first case there would be a knowingly false assertion as to the fact; in the second, as to his belief; and in the third, as to his knowledge of the fact; and in each case the intent to deceive would be a necessary inference. But in each case the *intent to deceive* must exist, and must be proved. If this intention is absent, there is no fraud. Hence if Carver honestly stated what he believed to be the facts, and did not misstate the source or extent of his information, the defendant is not liable in this action: *Kerr on Fraud & Mistake*, 54, 55, *et seq.*; *Pasley v. Freeman*, 2 Smith Lead. Cas. (7th Amer. ed.) 92, and notes; *Chandelor v. Lopus*, 1 Id. 299, and notes; *Haycraft v. Creasy*, 2 East, 92; *Stone v. Denny*, 4 Met. 151; *Marsh v. Falker*, 40 N. Y. 562; *Chester v. Comstock*, Id. 575; *Meyer v. Amidon*, 45 Id. 169; *Oberlander v. Spies*, Id. 175.

1. The evidence in this case is so voluminous that it is impossible to state it in full, and the different parts of it are so connected that a statement of a portion would give an imperfect and inaccurate idea of the case. But after reading the whole carefully, we are of opinion that it wholly fails to show that Carver's representations were fraudulently made—that is, made with intent to deceive. We find nothing tending to show that he knew them to be false, or that he did not honestly believe them to be true, or that he misstated the extent or sources of his information. On plaintiff's own showing it is clear that Carver had never been to the mine, and hence had no personal knowledge of its character and condition, but made his state-

ments upon reports received and information derived from others, and that plaintiff knew that fact.

2. We also think the evidence utterly fails to show that plaintiff believed these representations, and relied on them in making the purchase. It is true that in his examination in chief he states generally that he relied on them; but his cross-examination conclusively shows that he did not rely on them *as true* when he made his purchase. He makes the following among other statements: "I wouldn't let him [Carver] touch the money; wouldn't take his word that he was agent for the man. I considered that what he said was wind. I saw a good many men to see how far Carver's representations were corroborated. *I was anxious to see how I could protect myself and take the stock.* I didn't intend to take Carver's word that he was Merriam's agent. *I wanted to see that I was dealing with a responsible man.* These representations of Carver's were as the wind, unless they were certified to by the character of an honest man. I didn't mean that he should get any money, and I meant that Mr. Merriam should get my money, and should have the right to say that these things were true." Again, when asked if he would believe anything Carver said, he answered "No." When he went to see Merriam he says he made him the speech which had been taught him by his attorneys on a former occasion: "I have bought of you, through your agent, Mr. Carver, some Florence." When asked his object in making this speech, he replied, "To see whether he would say that Carver was or was not his agent." The evidence also shows that, so far from believing the statements of Carver, he interviewed numerous other parties, stockholders and others, to ascertain what they knew about the mine, and what value they placed upon the stock, and that, so far as he made the purchase upon a *belief in the existence of facts*, he acted upon what information he got from these parties, and not upon what Carver told him.

3. The evidence clearly shows the plaintiff's position to be just this: He knew that mines were proverbially uncertain, and might prove very profitable or a failure. He found that others had faith in this mine, and therefore he had; but he wished something more certain, and wanted a warranty from a respon-

sible man, so that he could keep his stock and get his dividends from the mine if it turned out well, or get his money back from the defendant if it did not. Whatever may have been plaintiff's belief as to the condition or value, present or prospective, of the mine, that belief was not based upon the statements of Carver. His only reliance upon Carver's statements consisted, not in his belief of their truth, but because he thought, if false, Merriam would be responsible for them. He made his purchase, not because of any belief in their *truthfulness*, but because he thought Merriam would be liable as warrantor to make them good if they proved untrue. On such a state of facts, as the Court below well remarked, if plaintiff made out anything, it was a cause of action on a warranty and not for deceit.

On either or both of these grounds the action was properly dismissed.

The plaintiff, however, suggests that he has set up a second cause of action for a rescission of the contract, and claims that in equity, when the misrepresentation of a fact relied upon by the injured party to a contract operates as a fraud upon him, he is entitled to a rescission, although the misrepresentation was made in the belief that it was true. It may be doubted whether there is any such different rule in equity, in an action to rescind, from that which obtains in an action at law for deceit. But, waiving this, it is sufficient answer that the complaint sets up only one cause of action—an action for damages for deceit—and the case was tried throughout on that theory.

Judgment affirmed.

Cowley v. Smyth, 46 N. J. L. 380.

A misrepresentation as to a point of law is not a fraud.

STARR v. BENNETT.

Supreme Court of New York, 1843.

5 Hill, 303.

BRONSON, J. The plaintiffs have not given a name to this action; but I presume it was intended to be an action on the case for deceit. The deputy made the usual return—*nulla bona*—on the execution; though in strictness he should have added that Leslie had no lands, tenements, or chattels real in the county. The plaintiffs waited eight months, and then, instead of sending to the clerk's office for a copy of the return, they went to the deputy to make inquiries, telling him they intended to file a creditor's bill. They did not ask the deputy to inform them *what particular return he had made*, but desired his *opinion* upon a question of *law*, to wit, "whether the return was made *in due form of law*;" and the deputy answered that the "*fieri facias* was filed, with a return thereon *in due form of law*." For this deceit and falsehood the action is brought. It was admitted in *Pasley v. Freeman*, 3 T. R. 51, that no action would lie for a false or erroneous assertion concerning a mere matter of judgment or opinion. I have met with no case which holds a different doctrine, and am unwilling to make a precedent. If the plaintiffs wanted an opinion upon this question, they should have gone to some person learned in the law, and not to a deputy sheriff.

. If the defendant had been questioned about a matter of *fact*, to wit, upon the words of the return, and had answered falsely, I think no action could be maintained. The return was not only in writing, but it was matter of record, which was open to the inspection of every one, and the plaintiffs should have examined for themselves. In *Bayly v. Merrel*, Cro. Jac. 386, the plaintiff complained that he had killed seven of his horses in drawing a load of madder which weighed twenty-two hundred

pounds, and which the defendant, who had employed the plaintiff to carry the load, had falsely and fraudulently affirmed was of the weight of only eight hundred pounds. After verdict for the plaintiff the judgment was arrested because the weight of the load was not a matter peculiarly within the knowledge of the defendant, and the plaintiff had the means of correct information by weighing the goods. The Court said it was gross negligence in the plaintiff not to weigh the goods. This case is also reported in 3 Bulst. 95. It was approved in *Pasley v. Freeman*, 3 T. R. 51, where this action for deceit was carried to its utmost limit. ASHHURST, J., said the carrier had the means of attaining certain knowledge in his own power, by weighing the goods; and therefore it was a foolish credulity, against which the law would not relieve. LORD KENYON took the same view of the question. It was distinguished from the case of a false affirmation concerning the credit or solvency of an individual, because there the party is seeking information which he can only acquire by consulting others. But here, taking the case in its most favorable aspect for the plaintiffs, they are suing for a false affirmation concerning the contents of a written instrument, and when that instrument was completely within their reach. There is no precedent for such an action, and I trust there never will be. Men must give some attention to their own business, instead of questioning their neighbors and then suing them for deceit.

It is unnecessary to look further into the declaration. Either of the grounds which have been mentioned is fatal to the action.

Judgment for the defendant.

Ins. Company v. Reed, 33 Ohio St. 293; *Drake v. Latham*, 50 Ill. 270; *Fisk v. Cleeland*, 33 Id. 238.

A misrepresentation as to a matter of opinion is not a fraud.

MOONEY *v.* MILLER.

Supreme Judicial Court of Massachusetts, 1869.

102 Mass. 217.

CHAPMAN, C. J. This is an action of tort, founded on certain fraudulent representations alleged to have been made by the defendant to the plaintiff, by which she was induced to purchase a lot of land. Some false representations of this character are actionable, and others are not. If they relate to material facts not within the observation of the opposite party, and are made with intent to deceive, they are actionable; but if the truth can be ascertained by ordinary vigilance, they are not actionable: *Brown v. Castles*, 11 Cush. 348.

Upon these principles, it is held that, if the representations relate to the quality and productiveness of the soil, or the number of acres within boundaries which are pointed out, they are not actionable, for they are to be regarded as the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries: *Gordon v. Parmalee*, 2 Allen, 212. So as to representations of the vendor in regard to the price he paid for the land: *Hemmer v. Cooper*, 8 Allen, 334. These authorities are sufficient to illustrate the principle upon which this case depends.

The plaintiff went with the defendant to see his land. There were no buildings on it, and the first representation alleged is, that there were a house and barn on an adjoining lot, which the plaintiff could get very cheap, and by getting it of the defendant's uncle she could get a square piece of land. All that was said on this subject was obviously the expression of a mere opinion, on which a purchaser should not rely. He also said he got ten tons of hay off the land the past year; but the evidence does not prove that this statement was substantially false.

What he said as to the hay she would get, and the quantity of wood on the place, was the mere expression of an opinion. He pointed out the boundaries of the lot truly, and what he said as to the number of acres the plaintiff should not have relied upon, especially after what occurred when the deed was made. The Court ruled correctly that the action was not maintained by the evidence.

Exceptions overruled.

Warren v. Doolittle, 61 Ill. 161 ; Gordon v. Parmelee, 2 Allen, 212 ; Gordon v. Butler, 105 U. S. 553.

A misrepresentation as to an immaterial fact is not a fraud : Geddes v. Pennington, 5 Dow, 159.

Artful devices by which one party conceals material facts respecting the subject-matter, or by which he prevents the other party from discovering such facts, are fraudulent and hence vitiate the contract ab initio.

CROYLE v. MOSES.

Supreme Court of Pennsylvania, 1879.

90 Pa. St. 250.

MERCUR, J. This is an action on the case to recover damages for the fraudulent sale of a horse. The declaration contains two counts. One, charging a fraudulent warranty ; the other, deceit and fraudulent representations. Two distinct questions are thus presented : the one, whether the defendant warranted the horse to be sound ; the other, whether, without any warranty, he fraudulently and deceitfully practised some trick or artifice in making the sale whereby the plaintiff was deceived and injured.

As bearing in some degree on the first count, we cannot convict the Court of Error in admitting the evidence covered by the first and second assignments. The third assignment covers the answer of the Court to the fifth, sixth, and seventh points

submitted by the plaintiff. No one of these points presents the question of a warranty against the defect complained of, but all of them are based on deceitful, fraudulent, and artful statements and representations. Each of them, in different language, substantially requested the Court to charge the jury that the defendant was liable in case he, with intent to deceive the plaintiff, answered him artfully, so as to mislead him to his injury.

The learned Judge answered all these points together, and appears to have overlooked the distinction between warranty and deceitful representations. As was said in *Krumbharr v. Birch*, 2 Norris, 426, "It needs no citation of authorities to prove that the wilful misrepresentation or concealment of a material fact by the vendor constitutes a fraud." But fraudulent representations may be as well by arts or artifices calculated to deceive, as by positive assertions: 2 Kent's Com. *483; 1 Story's Eq., sect. 192; Brightly's Eq., sect. 55; *Cornelius v. Molloy*, 7 Barr, 293.

Although no answer to the points, yet in the absence of artifice or deceitful representations, the jury was correctly told "the defendant was not bound to inform the plaintiff that the horse was a cribber. He had a right to remain silent and let the purchaser examine for himself and buy on his own judgment." The jury was also correctly instructed that "a seller has no right, by words or acts, to mislead a buyer and prevent an examination or inquiry." The error was committed in the next sentence, which declared, "But a mere evasive answer is not of itself equivalent to a warranty." This is undoubtedly true, but is no answer to the points. The request was not for instructions as to what constituted a warranty or what answers were equivalent to a warranty, but as to the effect of fraudulent acts and declarations in the absence of a warranty. The Court again interwove the warranty, saying: "The seller may keep the horse's defects to himself, if he does not warrant nor make false representations nor fraudulent concealment, and the buyer has an opportunity to inspect and test the horse, and buys on his own judgment. The mere short hitching of the horse to a fence, accompanied by the defendant's statement that he thus hitched him to keep him from rubbing the saddle, would not of itself be a false representation, equivalent to a

warranty, if the buyer bought on his own judgment, and after an express refusal on the part of the defendant to warrant the horse." Thus the prominent thought expressed in the answer of the Court relates to a warranty, while no such question was presented in the points. They called for no instructions that any "false representations were equivalent to a warranty;" nor that "the mere short hitching of the horse," and the defendant's statement relating thereto, were of themselves equivalent to a warranty. The question presented by the points was, substantially, if at the time of the sale the horse was known to the defendant to be a "cribber or wind-sucker," and this fact was artfully concealed by him to the injury of the plaintiff, whether it was such a concealment of a latent defect as would avoid the contract. The points submitted did not rest on the mere facts that the horse was hitched short and the reasons assigned therefor, but also on the additional facts that the defendant knew him to be a crib-biter, and resorted to this artifice to conceal it, and gave an untruthful reason to mislead and deceive the plaintiff. The complaint is not for a refusal or omission to answer, but for an evasive and artful answer. That the horse was actually a crib-biter, and so known to the defendant, was clearly proved. Whether that defect made him unsound was fairly submitted to the jury, under the evidence. That it lessened his market value seems to admit of no doubt. If the jury should believe, as the plaintiff testified, that he said to the defendant, "If there is anything wrong with the horse, I do not want him at any price," and that the defendant, with knowledge he was a crib-biter, answered the plaintiff artfully and evasively, with intent to deceive him, and did thereby deceive him to his injury, it was such a fraud on the plaintiff as would justify him in rescinding the contract. The answer of the Court, blending warranty with fraudulent artifices, failed to present the latter to the mind of the jury in a proper manner. The answer was calculated to mislead them as to the law applicable to that branch of the case: *Relf v. Rapp*, 3 W. & S. 21; *Wenger v. Barnhart*, 5 P. F. Smith, 300; *Gregg Township v. Jamison*, Id. 468; *Stall v. Meek*, 20 Id. 181.

Judgment reversed, and a venire facias de novo awarded.

Kenner v. Harding, 85 Ill. 264.

Non-disclosure of extrinsic facts, which may affect the price of a commodity, is not a fraud on the part of him who knows but does not reveal them.

Laidlow v. Organ.

Supreme Court of the United States, 1817.

2 Wheaton, 178.

Where one party knew of the treaty of peace signed by the British and American Commissioners, which fact would materially affect the price of tobacco, and it was not known to the other party: *Held*, that the party knowing the same is not under legal obligations to disclose it to the other when contracting about the tobacco.

MARSHALL, C. J. The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The Court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other. The Court thinks that the absolute instruction of the Judge was erroneous, and that the question whether any imposition was practised by the vendee upon the vendor ought to have been submitted to the jury. For these reasons the judgment must be reversed, and the cause remanded to the District Court of Louisiana, with directions to award a venire facias de novo.

Venire de novo awarded.

To the same point.

HARRIS v. TYSON.

Supreme Court of Pennsylvania, 1855.

24 Penn. St. 347.

BLACK, J. This action depends on the defendant's right to dig and take away chrome from the land of the plaintiff. The defendant claims that right under the plaintiff's deed, giving and granting it in due form. But the plaintiff asserts that the deed is fraudulent and void because, 1. The defendant suppressed the truth; 2. He suggested a falsehood; 3. He paid a totally inadequate consideration; and 4. He got the deed by means of threats which amounted to duress.

1. A person who knows that there is a mine on the land of another may nevertheless buy it. The ignorance of the vendor is not of itself fraud on the part of the purchaser. A purchaser is not bound by our laws to make the man he buys from as wise as himself. The mere fact, therefore, that Tyson knew there was sand chrome on Harris's land, and that Harris himself was ignorant of it, even if that were exclusively established, would not be ground for impugning the validity of the deed. But it is not by any means clear that one party had much advantage over the other in this respect. They both knew very well that chrome could be got there, which one wanted and the other had no use for. But the whole extent of it in quantity was probably not known to either of them for some time after the deed. When it was discovered that sand chrome was as valuable as the same mineral found in the rock, and that large quantities of the former could be got in certain parts of the fast land as well as by the streams, it was natural enough that the plaintiff should repent and the defendant rejoice over the contract; but this did not touch its validity. Every man must bear the loss of a bad bargain legally and honestly made. If not, he could not enjoy in safety the fruits of a good one. Besides, we do not feel sure that the contract has made the plaintiff any poorer,

for it is not improbable that he would never have discovered the value of the mineral deposit on his land if he had not granted to the defendant the privilege of digging.

2. If the defendant, during the negotiation for the purchase, wilfully made any misstatement concerning a material fact, and then misled the plaintiff and induced him to sell it at a lower price than he otherwise would, then the contract was a cheat and the deed is void utterly. But in all cases where the evidence brings the parties face to face, the language and conduct of the defendant seem to have been unexceptionable. An offer was made and rejected to prove that Tyson had made certain statements in the neighborhood which were calculated to produce the impression that all the chrome in that region was not very valuable. It was even proposed to be shown that he had spoken in depreciating terms of sand chrome on a tract adjoining Harris's. It would at least have been useless, and it might have had a pernicious influence on the minds of the jury, to have admitted such evidence. To invalidate a solemn deed by showing that misrepresentations were used to obtain it, there must be very clear proof that the falsehood was told directly or indirectly to the grantor. It is not to be supposed that he was influenced by a statement neither made to himself nor communicated to him. If the vendee's conduct in all his transactions with the vendor was honest and fair, he is not answerable in this action for what he may have said elsewhere to other persons.

3. Mere inadequacy of price is not sufficient to set aside a deed. It is sometimes regarded as a suspicious circumstance when coupled with other strong evidence of fraud. Here it would hardly be entitled to that much consideration. The sale of this privilege at a low price is explained by so many reasons that it is not necessary to account for it by supposing there was any foul play. But it is enough to say that the plaintiff had a right to sell at what price he pleased or keep his property. Having chosen to do the former, he cannot undo it by changing his own mind.

4. The allegation of duress is founded on these facts: Before the date of the deed now in question, Harris made a written contract with Tyson to sell him his land out and out; but he

refused to make the conveyance, and Tyson declared that he would bring an action on the covenant. The difficulty was then settled by the cancellation of the agreement and the execution of the deed granting the mineral right. The Court received this evidence, and most properly instructed the jury that duress to invalidate the deed must be of the person. For the plaintiff it was insisted that the deed might be avoided merely by proving a threat to sue the grantor for a good cause of action. There is not only no judicial decision in favor of this opinion, but I think it is new even as an argument at the bar.

This is the whole body of the case. There is nothing else of leading importance in it. Yet the judgment is brought here on no less than thirty-nine exceptions.

The 1st, 2d, 4th, 5th, 7th, 8th, 9th, 10th, 12th, 13th, 14th, 15th, 16th, and 39th disclose a succession of struggles to get in evidence of Tyson's declarations concerning sand chrome on other lands in the same neighborhood. These declarations may have had a tendency to impress the minds of those who heard them, and who knew nothing on the subject from other sources, with the opinion that sand chrome was worthless, but they had no connection with and no relevancy to the purchase from Harris, except that his land had the same kind of mineral in it. No attempt or offer was made to show that Harris ever heard these statements from Tyson, or heard of them from anybody else.

The 3d is the rejection of evidence that the plaintiff was a poor man. It is impossible to see what this had to do with the merits of the case. It could not strengthen any more than it could weaken his title to the property in dispute.

The 6th points us to an exception by which we find that the defendant filed of record a disclaimer of all right to the land, except the privilege of taking out chrome. It is not denied that this put the dispute on its true ground. The defendant had a right, and perhaps it was his duty to file it. Certainly it did the plaintiff no harm. The bill of exceptions does not say that the paper was read to the jury.

The 17th and 18th were offers to prove conversations of Tyson, but what the conversations were was not stated, nor so

much as hinted at. It is impossible for us to make anything out of exceptions like these.

The subject of the 19th was a proposal to prove a transaction between two other parties who were altogether strangers to this business. It was about chrome, to be sure, but it could have thrown no light on the subject under investigation. It was not only a bargain between other parties, but it was five to nine years later in time than the contract between Harris and Tyson, and the bill of exceptions does not even show what its terms were. We take it for granted that this offer was not made for the purpose of showing the disparity between the value of Harris's ore and the price he got for it, because the Court gave the plaintiff leave to prove all he could on that subject, and the very witness of whom the question was asked testified fully and directly to the point.

In the 20th we see an offer to prove that it was Tyson's declared intention to monopolize the chrome business. This is somewhat indefinite. If Tyson really thought he could get a monopoly in the proper sense of the word, that is, a law forbidding all persons but himself from engaging in such an enterprise, he is not the shrewd man he is represented to be, and his fancy was a very harmless one. If he intended merely to carry on the manufacture of chrome so largely and sell it so cheaply that no one would think it worth while to compete with him, then he is a meritorious citizen. He has a right to all he can win by his science, labor, and capital honestly employed. Either way, the evidence offered could serve no purpose except to waken prejudices which had better be allowed to sleep.

The letter mentioned in the 21st specification was properly admitted. Its contents were communicated to Harris pending the negotiation, and show how it was conducted. After all that was said about foul play in getting the bargain, to withhold from the jury this clear and direct evidence of Tyson's fair dealing would have been gross injustice to him.

The remaining specifications refer to the charge. Those numbered from 22 to 37 inclusive are intended to particularize the several mistakes which the Judge fell into, and the 38th makes the sweeping assertion that the whole scope and tenor of the charge is erroneous. Of all the specific errors assigned,

we do not find one which we would feel justified in calling an error, and the charge as a whole is impartial and sound. It contains so convincing a refutation of the views which the plaintiff's counsel took of the case, that we wonder they were not perfectly satisfied with it.

Judgment affirmed.

Williams v. Spurr, 24 Mich. 335.

An insolvent who buys goods, promising to pay for them when he knows he cannot, perpetrates a fraud upon the other party which vitiates the contract.

CONCURRENT.

The minds of the parties must not only meet mutually and reciprocally, but they must agree to the same thing at the same time.

MACTIER v. FRITH.

Supreme Court of New York, 1830.

6 Wendell, 103.

MARCY, J. The object of the bill filed in this case is to obtain from the administrators of Mactier the proceeds of the 50 pipes of brandy which came into their possession after his death, and the amount of such notes taken on the sale of the 150 pipes on the 22d of March, 1823, as were uncollected and undisposed of at the death of Mactier, or at least so much thereof as may be necessary to pay the balance due the respondent for disbursements on account of the adventure. The question on which the decision in this case, as I apprehend, mainly depends, relates to the alleged sale of the brandy to Mactier. There are many definitions of what constitutes a contract, but all of them

are, of course, substantially alike. Powell states a contract to be a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other: Powell on Cont. 4. In testing the validity of contracts many things are to be considered. The contract that the appellant sets up in this case is alleged by the respondent to be deficient in several essential requisites. When that was done which, on the assumption of there being parties capable of contracting, was necessary, as the respondent contends, to complete it, Mactier was dead. If the contract was only in progress of execution, and there remained but a single act to be done to complete it, his death rendered the performance of that act impossible; it suspended the proceedings at the very point where they were when it occurred.

The doctrine of relation was discussed on the argument, and its application urged on us. It was insisted that if nothing but a formal act was to be done, and it was done by the surviving party after the death of the other, and in ignorance of it, this act might be adjudged to relate to a period antecedent to the death of the party dying. If, as it was held in the Court below, the bargain in this case could not be closed until Frith received Mactier's letter accepting his offer to sell, the receiving that letter, it was said, might be considered as having relation to the time when it was sent, upon the principle that Courts often resort to this doctrine of relation to prevent an injury resulting to a party from the act of God. Where an agent without competent authority makes a contract, a subsequent ratification by the principal relates back to the time when the agent acted. The ratification is equivalent to an original authority; it is considered in law as furnishing proof of an authority in the agent at the time he assumed to have it. If, however, he had disclosed his want of authority, but had settled the terms of the contract, in the belief that what he did would be ratified, the doctrine of relation would not apply; the bargain would take effect from the time of the ratification. The reason of the distinction which I apprehend to exist in the two cases is that in the one acts are done which make a perfect contract, provided the actors had the authority they assumed to have, and the ratification of their acts by those from whom their

power must have been derived, if they had it, is legal evidence that they did have it when they acted. In the other case the fact being made known that there was not competent power in one of the actors, the very foundation on which alone the presumption of authority can rest is destroyed. A presumption will not be called in to supply an impossibility. In a contract of sale all agree that there must be two minds at least concurring at the moment of its completion, but this cannot be if there be but one contracting party in existence. There is also, as I conceive, a difference between acts essential to perfect an agreement and those which relate to the forms prescribed in certain instances as modes of proof. This difference is illustrated by those cases which were referred to on the argument concerning the enrolment of deeds. The enrolment is a formal act, but necessary to be done to enable the party to prove the bargain and sale; but when it is done it relates to the time when the indenture was executed. It is, as LORD BACON calls it, but a perfective ceremony of the first deed of bargain and sale: *Regula*, 14. So where chancery decrees the execution of a parol contract on the ground of part performance, the title certainly, as between the parties, vests from the time of the contract, and not from the performance of those acts that remove the bar created by the Statute of Frauds. The doctrine of relation may be permitted to operate on these *formal acts*, but it cannot be used, as it is proposed to use it here, to supply a *party* to a contract who does not exist at the time when the act is done which fixes to it the seal of validity; or, what is the same thing, it cannot carry back that act to a time when parties capable of contracting did in fact exist. This view of the subject is conformable to the civil law as well as the law of France. By these laws, the death of the party offering to sell is held to be a revocation of the offer, and an acceptance subsequent to that event is ineffectual to close the bargain: Pothier, *Traité du Contrat de Vente*, (a) p. 1, § 2, art. 3, No. 32. My con-

(a) Pour que le consentement intervienne en ce cas (entre absens) il faut que la volonté de la partie qui a écrit à l'autre pour lui proposer le marché, ait persévéré jusqu'au temps auquel sa lettre sera parvenue à l'autre partie, et auquel l'autre partie aura déclaré qu'elle acceptait le marché. Cette volonté est présumée d'avoir persévéré tant qu'il ne

clusion, in regard to this objection to the alleged contract, is, that if any act was required to be done, even by Frith, to complete the sale when Mactier died, that act could not be subsequently performed.

I am now to consider whether there was a contract, before Mactier's death, which had the consent of the contracting parties so given and made known as to be binding on them. That a consent is necessary all agree, but what shall constitute it in

parait rien de contraire ; mais, si j'ai écrit à un marchand de Livourne une lettre, par laquelle jo lui proposais de me vendre une certaine partie de marchandises, pour un certain prix, et qu' avant que ma lettre ait pu lui parvenir, je lui en aie écrit une seconde, par laquelle je lui marquais que je ne voulais plus cette emplette, ou qu' avant ce temps je sois mort, ou que j'aie perdu l'usage de la raison ; quoique ce marchand de Livourne, au reçu de ma lettre, ignorant, ou mon changement de volonté, ou ma mort, ou ma démence, ait fait réponse qu'il acceptait le marché proposé, néanmoins il ne sera intervenu entre nous aucun contrat de vente ; car ma volonté n'ayant pas persévéré jusqu'au temps auquel ce marchand a reçu ma lettre, et accepté la proposition qu' elle contenait, il ne s' est pas rencontré un consentement ou concours de nos volontés nécessaire pour former le contrat de vente. C'est l'avis de Barthole, et des autres docteurs cités par Bruneman, *ad. l. 1, § 2, de contrat. empt.* qui ont rejeté avec raison l'avis contraire de la Glose, *ad dictam legem.*

TRANSLATION.

In order that this consent may take place where the contracting parties are in different places, it is necessary that the will of the party who has written to the other proposing a sale, should continue until his letter has reached the other party and he has declared that he accepts the offer. This will is presumed to have continued, if nothing appears to the contrary. But if I have written to a merchant at Livourne a letter proposing to sell him a particular article for a specified price, and before my letter has been received by him, I write to him a second declining to make the contract, or if before that time (*i. e.*, before my letter is received and the offer contained in it is accepted) I am dead or have lost the use of my reason, although the merchant at Livourne, ignorant of my change of will, death, or loss of reason, should, on receiving my letter, accept the offer contained in it, there would be no contract of sale ; for, my will not having continued down to the time when this merchant had received my letter and accepted the proposition contained therein, there was not that concurrence or meeting of our minds required to make a contract of sale. This is the opinion of Bartholus, and of the other doctors of the civil law quoted by Bruneman, *ad. l. 1, § 2, ff, de contrat. empt.* who have correctly rejected the contrary opinion of the commentary *ad dictam legem.*

a given case may admit of much diversity of opinion. The consent of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for a specified price, with the will of the purchaser to buy the same thing for that price: Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 3, No. 31. Delvincourt, another eminent French writer on the civil code of France, says that although it is impossible that there should be a contract without the consent of all parties, it is not indispensable that the wills of the parties should concur at the same instant, provided the will of the one that did not concur at first is declared before the will of the other is revoked: 5 *Cours de Code Civil*, 93.(a) Although the will of the party making the offer may precede that of the party accepting, yet it must continue down to the time of the acceptance. Where parties are together chaffering about an article of merchandise, and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue unless it is revoked, to the close of their interview and negotiation on the same subject, and if during this time the other party says he will take the article on the terms proposed, the bargain is thereby closed: Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 3, No. 31. What I mean by its being closed is, that nothing mutual between the parties remains to be done to give to either a right to have it carried into effect; either can enforce it against the other, or recover damages for the non-fulfilment of it; but if there be conditions expressed or implied to be performed by the purchaser, he cannot compel the delivery until they are performed. If the price is to be immediately paid or security given, he cannot have the property until payment made, or security given, or a tender thereof: Touchstone, 204, 5; Noy's Max. chap. 42; 2 Blackstone's Comm. 447.

Where the negotiations between the contracting parties re-

(a) Il est impossible de concevoir un contrat sans le consentement de toutes les parties. Mais il n'est pas nécessaire que les volontés des parties concurrent dans le même instant; pourvu que la volonté de celle qui n'est pas intervenue dans le principe soit déclarée avant que l'autre ait révoqué la sienne, la convention est valablement formée.

siding at a distance from each other is conducted, as it usually is, by letters, it is necessary, in order that their minds may meet, that the will of the party making the proposition to sell should continue until his letter shall have reached the other, and he shall have signified, or at least had an opportunity to signify, his acceptance of the proposition. This, Pothier holds to be the legal presumption unless the contrary appears. His language is: *Cette volonté est presumée tant qu'il ne paraît rien de contraire.* This doctrine, which presumes the continuance of a willingness to contract after it has been manifested by an offer, is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless *store-house* of jurisprudence: it is found in the common law; indeed, it exists, of necessity, wherever the power to contract exists in parties separated from each other. The rule of the common law is, that wherever the existence of a particular subject-matter or relation has been once proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the nature of the subject-matter: 16 East, 55; 3 Stark. Ev. 1252. The case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, proceeds upon and affirms the principle that the willingness to contract thus manifested is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly revoked or countervailed by a contrary presumption. In that case it was said, "the defendants must be considered in law as making during every instant of time their letter was travelling the same identical offer to the plaintiffs; and then the contract is complete by the acceptance of it by the latter." Against the authority of the case of *Adams v. Lindsell*, we have urged on us a decision of a Court of the highest respectability in one of our sister States. The case of *McCulloch v. The Eagle Ins. Co.*, 1 Pick. 278, conflicts in principle, according to my views of it, with the case decided by the King's Bench. I should have been pleased to see these tribunals harmonize upon a question of no small importance to the commercial world; and I have therefore deliberately weighed the ingenious attempts made to reconcile these decisions upon this point; but these attempts appear to me to have been unsuccessful. A refinement which

which would distinguish between a contract for insurance, and one for the sale of goods in relation to the assent of the parties, might relieve us from the embarrassment which the different principles of these decisions is calculated to produce; but to apply such a distinction hereafter would doubtless involve Courts in a still more distressing embarrassment. Distinctions which are not founded on a difference in the nature of things are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules appealing to factitious reasons for their support, consequently difficult to be acquired, and often of uncertain application. The two cases referred to should have had applied to them the same rule of law, and we are required to say what that rule is in deciding the case now under consideration.

The principle of the decision of the King's Bench is simply that the acceptance of an offer made, through the medium of a letter, binds the bargain if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the Supreme Court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice. The Chancellor, in deciding this case, gave his sanction to the latter rule: "To make a valid contract," he says, "it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must know that fact."^(a) The decision of the

(a) This proposition, which is an extract from the Chancellor's opinion as printed in the case presented to this Court, is somewhat modified in its terms, as it appears in the reports of the Court of Chancery. There it is said, "To make a valid contract, it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must communicate that fact to each other, so that both parties may know that their minds do meet:" 1 Paige, 442. It is understood that the Chancellor has said that his views on this subject have been mistaken or misapprehended. Though the general proposition above quoted is advanced in his opinion, it is introduced in that part of it where he is considering the effect of Mactier's letter of the 25th, and Frith's of the 28th of March, and what Frith intended to insert in his letter of the 7th of March. Having considered the offer of Frith, made in his letter of the 24th December, disposed of by Mactier in his answer of the 17th January, de-

Court of Massachusetts makes knowledge by the party tendering the offer of the other's acceptance essential to the completion of the contract. If one party is not bound till he knows or might know, and therefore is presumed to know, that the other has accepted, the accepting party on the same principle ought not to be bound till he knows the offering party has not recalled the offer before knowledge of the acceptance. The principle of that case would bring the matter to the point stated by the Chancellor, viz., the parties must know that their minds meet on the subject of the contract. If a bargain can be completed between absent parties, it must be when one of them cannot know the fact whether it be or be not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not therefore arise from a knowledge of the present concurrence of the wills of the contracting parties. All the authorities state a contract or an agreement (which is the same thing) to be *aggregatio mentium*. Why should not this *meeting of the minds*, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not and must it not be the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received,

clining to accept it, he then looks at the letters of the 25th and 28th of March to see if a contract was concluded by them; and as Mactier died before his letter of the 25th reached Frith, and before Frith's letter of the 28th renewing the offer reached New York, he considers those letters did not of themselves make a valid contract. The remark of the Chancellor which has been taken for a general proposition of law is understood to have been made with a direct reference to the facts presented by these two letters. Taking this view of the Chancellor's observation, the principal point of difference between him and the Court for the correction of errors would seem to be, that he considered Mactier's letter of the 17th January as declining the offer, and therefore putting an end to it; and the Court considered that Mactier's answer held the offer under advisement, that it was so held down to the time when M. accepted it, and that Frith assented to its being thus held under advisement.

because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind, it means such as have been made manifest by overt acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts, and when thus made known it is effective, although the parties who may claim the benefit of, or be bound by, a contract thus made, may for a reason remain ignorant of its being made.

Testing the rules of law laid down in the two cases to which I have referred by the authority of reason, and the practical results that are likely to flow from them, it does appear to me that we are not left at liberty to hesitate about the choice. If we are inclined from the force of abstract reason to prefer the rule laid down by the Court of King's Bench, that inclination will be greatly strengthened by a recurrence to the opinions of Courts and jurists. The Common Pleas in England seem to me to have given their approval to the decision of *Adams v. Lindsell*, 4 Bing. 653. Judge WASHINGTON, in delivering the opinion of the Court, in *Gleason v. Henshaw*, 4 Wheaton, 228, said: "Until the terms of the agreement have received the assent of both parties the negotiation is open, and imposes no obligation on either." The inference from this proposition is, that the assent of the parties to the terms of the agreement, and not their knowledge of it, completes the contract. It was decided in the Circuit Court of the United States, for Pennsylvania, that contracts are formed by the offer on the one hand, and an acceptance on the other. After acceptance, the contract is obligatory on both: *Coxe's Dig.* 192. In this case knowledge of the acceptance is not brought into view as necessary to

constitute the obligation. Both the Roman law and the French civil code, as we have seen by the references already made, contain a doctrine in accordance with the principles of these cases. I think I am therefore warranted in saying that the proposition may be considered as established, that the acceptance of a written offer of a contract of sale consummates the bargain, provided the offer is standing at the time of the acceptance.

What shall constitute an acceptance will depend, in a great measure, upon circumstance. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties: keeping silence, under certain circumstances, is an assent to a proposition; any thing that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract as much as the offer is of the other; the knowledge by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other.

I will now apply this law to the facts of this case. Frith's offer to sell his interest in the brandy certainly continued till his letter of the 24th of December was received at New York and Mactier had a fair opportunity to answer it. If the answer of the 17th of January had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted; there was a promise to accept upon a contingency, for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is, in case of such a war, "I will at once

decide to take the adventure to my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was that, if an accepted event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: *Verbum imperfecti temporis rem adhuc imperfectam significat*. There is a wide difference between a promise to give an assent to a proposition for a contract on the happening of a contingency and the annunciation of the present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised acceptance, and not the happening of the event, that gives validity to the contract. If in this case the offer of Frith had been to Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do, to effect an acceptance, was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy

before the 17th day of March. The insurance that he effected on his commissions on the 1st of March disproves the existence of such a determination on that day ; but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place on the 17th of March. In answer to the offer Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war ; on the 17th of March, when that event was considered as settled, he entered the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th, with a postscript on the 31st of March, he accepted the offer. This letter was immediately transmitted to Frith, and as soon as the 28th of March entries were made in his books showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

An offer, when once made, continues, as I have heretofore shown, to the satisfaction of my own mind at least, until it is expressly revoked, or until circumstances authorize a presumption that it is revoked. The offer itself may show very clearly when the presumption of revocation attaches. Where it is made to be replied to by return mail, the party to whom it is addressed must at once perceive that it is not to stand for an acceptance, to be transmitted after that mail. If an offer stands until it is expressly withdrawn, or is presumed to be withdrawn, whether it is held out to a party at a particular period or not, is a matter of fact. Then we are to determine, as a matter of fact, whether Frith's offer was held out for Mactier's acceptance until the 31st of March ; if Frith intended it should stand on, and he viewed himself as tendering it to Mactier down to that time, we are bound to regard it as standing, unless his intention was the result of the fraudulent conduct of Mactier. The acts of Frith, after the death of Mactier, could do nothing towards completing an unfinished contract ; but I think they may be fairly adverted to for the

purpose of ascertaining his intentions in relation to the continuance of his offer. On the 7th of March he acknowledges Mactier's letter of the 17th January, which did not decline, as it has been construed to do, the offer, but apprized him that it was kept under advisement; and by using the expression, "noting the contents," Frith is, I think, to be understood as yielding to the proposed delay. If a doubt as to this construction of that letter could spring up in the mind, it would be at once removed by the perusal of the letter of the 28th of the same month. In that he expresses a wish to *confirm* what he had said in the letter making the offer to sell, and declares that he had in a previous letter, which must mean that of the 7th, omitted to communicate the same thing. In answering Mactier's letter, which contained the acceptance of his offer, he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesced in the sale. It appears to me to be impossible to say, after reading the letters of Frith, written subsequent to his knowledge of Mactier's acceptance, that he did not consider the offer as held out to Mactier down to the time when it was accepted, and the bargain closed by that acceptance; and I think we must adjudge it to have been closed, unless the agreement was nugatory by reason that the thing to which it related had not an actual or potential existence when the contract was consummated.

Where both parties are under a mistake as to the existence of the thing contracted to be sold, the bargain fails. The cases put by POTHIER and Chancellor KENT are the sale of a horse which happens to be dead, or of a house consumed by fire before the contract was concluded. The law which has been applied to such cases is not, in my judgment, applicable to this. Property that has no actual existence is the subject of a valid contract of sale, as a carriage not yet made, or a crop not grown; they are considered to have a potential existence. A person may sell an article to which he has no title or pretence of title: Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 1. There is, I apprehend, no just ground for saying that the principal part of this brandy was not in existence on the 31st of March, the time when I consider the contract to have become

perfected. Fifty pipes were in the public store; the remainder had been sold but a few days before, and was probably but partially consumed; but whether it was or not is not, in my view of it, material to this case. If the contract was obligatory on one, it was on both. Could Mactier have objected to it, and placed its nullity on the ground that he had consumed a part of the brandy before he accepted the offer for the purchase? Such a defence would not be listened to in any Court; it could invoke no principle of justice to its aid.

Another objection to the contract was drawn from the alleged fraudulent conduct of Mactier. The bill does not seem to me to put the claim to the interference of the Court below specifically upon that ground. It does not seek to avoid the contract on the ground that Frith was inveigled into it by the contrivance and artifice of Mactier, but it denies the existence of those formalities which are requisite to conclude a contract. Frith complains, it is true, that Mactier did not, by his letter of the 25th of March or any other, inform him of the sale of the brandy, of its value in New York, or of the arrival of the vessel with the brandy on board. The letter of the 25th did apprise him that the brandy had arrived. If any act was to be done by Frith to complete the bargain, the concealment of any fact that might influence his determination with regard to that act might give rise to the imputation of fraud; and if such fact was concealed with a view to procure an assent to a contract to which it is probable his assent would not have been given had he received information of the fact concealed, he might allege the concealment to exonerate himself from the obligation to fulfil it; but if he had no affirmative act to perform before the bargain might be closed, and Mactier was in a situation that gave him the right to close it, and he did so before the information which is alleged to have been kept back could have reached Frith, if it had been duly transmitted, he has suffered no injury; indeed there is no ground for a presumption of fraud. My conclusion therefore is, that the contract was consummated between the parties before the death of Mactier, by which he acquired all Frith's right to the two hundred pipes of brandy.

The law in relation to the right of the vendor of goods to

stop them during their transit to the purchaser was much discussed on the argument; but I have been unable to discover how a question in relation to such a right can properly arise from the facts in this case. If there was not a sale, such a question certainly cannot arise, for then there would be no vendor or vendee, and consequently no transit of the brandy from the one to the other. If there was a sale (and I hold there was), the question does not arise, because there was in fact no stoppage or any act that can in law be regarded as amounting to a stoppage. By virtue of the purchase the title to the brandy vested in Mactier; no actual delivery, if it was not in his possession, was necessary to perfect his title; if the brandy had been destroyed on the first day of April, or the notes taken for the portion previously sold had proved utterly valueless, the loss would have fallen entirely on Mactier. The unsold brandy was his absolute property, and on his death the title to it vested in his representatives. On the assumption that it was on its transit, the right of the representatives to it was subject to be affected in the same manner as Mactier's might have been if he had been in life; it might have been defeated by a stoppage *in transitu*. A right to stop goods in their transit does not arise from the circumstance that the bargain is not complete until the purchaser gets actual possession of them, but it is a right taking its origin undoubtedly in strong considerations of equity, and dependent upon a fact usually happening after the sale, and always unknown to the seller at the time of it—the insolvency of the purchaser: 3 Bos. & Pul. 584; 2 Kent's Com. 393, 428. The stoppage does not take place on the happening of the insolvency, but the right to stop is thereby acquired. The acquisition of the right works no beneficial result to the seller unless he intercepts the goods in their transit. I have seen no case where this right has been held to attach on the death of the purchaser, if his estate was solvent. I think the seller could not, in such case, justify an interference with the goods sold while on their transit. It arises in case of death and insolvency, but not otherwise than it would exist in the case of insolvency alone.

A question asked by LORD KENYON, in *Toole v. Hollingworth*, 5 T. R. 226, has given rise to a suggestion, that death

prevents the delivery; but the doubt entertained by that eminent Judge did not spring from a case where there had been a sale. The property there had been sent to answer a particular purpose, which was to raise funds to meet the consignee's acceptances; he, having become unable by reason of his insolvency to use them for that purpose, had no interest in them that went to his assignees. Where there is a general trading between two merchants residing at a distance from each other, and goods are sent by one to the other without being ordered, the title to them would not vest, as I conceive, in the merchant to whom they were sent until they were received and accepted. If he at once returned them as unfit for his use, or for any other cause, the title to them would not, in my opinion, have been changed. In such a case LORD KENYON might well ask, and mean thereby to express a strong doubt, whether the goods could be received by the executor if the consignee was dead when they arrived. The sending of goods, under such circumstances, amounts to no more than offer to sell them to the party to whom they are sent, and his acceptance of them would be necessary to complete a bargain. If he should be dead before they arrived, there would be no contracting party to close the bargain by an acceptance. Chancellor KENT's remarks, on the question put by LORD KENYON, show that he did not consider that a doubt of the nature of the one suggested could be indulged in a case where the title to the property had vested in the deceased person; for he says: "The language of the Court," in the case last referred to, "seems to be, that goods sent to a person who at the time was dead or disabled by bankruptcy from dealing, and *under an incapacity to acquire property*, could be recovered back upon the principle that there was no contract:" 7 Johns. Ch. 275.

Waiving all the other difficulties that were presented in opposition to Frith's right to stop the 50 pipes of brandy, and granting at the same time that he had the right, and that they were to be considered as in their transit while they remained in the custody of the custom-house officer at New York, it may be asked, what did he do to stay the delivery of them to the administrators of Mactier? Did he make an effort to get possession of them? Did he forbid the public officer to deliver them

to the administrators? This, I believe, is not pretended. The administrators took possession of them in May or June, and sold them about that time as a part of the estate of their intestate, and the first act in relation to them on the part of Frith was in July. They had a right to the brandy as property vested in Mactier at the time of his death by virtue of the contract of sale; and they can rightfully hold the avails thereof, unless Frith had rescinded the contract by stopping the brandy in its transit before it came to their actual possession. This he did not do, nor did he perform any other act equivalent to it.

Upon the view of the whole of this case, I entertain the opinion that the decree of the Chancellor ought to be reversed.

CONSIDERATION.

Every simple contract must be based upon a consideration, but, in case of specialties, the seal implies one though there may be none as a matter of fact.

I.

SPECIALTIES.

The seal implies a consideration, and the parties to the instrument are precluded from denying that there was one.

McMILLAN *v.* AMES.

Supreme Court of Minnesota, 1885.

33 Minn. 257.

VANDERBURGH, J. On the day it bears date the defendant executed and delivered to James McMillan & Co. the following covenant or agreement under seal, which was subsequently assigned to the plaintiff:—

"EXHIBIT A.

"I., E. B. Ames, of Minneapolis, Minnesota, for the onsideration hereinafter mentioned, do hereby promise and agree to grant, bargain, sell, and convey, by good and lawful warranty deed, unto James McMillan & Co., their heirs and assigns, in fee-simple, free from all incumbrances, at any time between the date of this instrument and the third day of August, 1884, that the said James McMillan & Co. may elect, that certain real estate situate in the county of Hennepin and State of Minnesotata, and described as follows, to wit, a part of lots nine (9) and ten (10), in block twenty (20), in the town of Minneapolis, being a tract of land twenty-seven (27) feet wide, fronting on First avenue south, and extending back ninety-nine (99) feet, together with the brick and stone building standing thereon, together with all the appurtenances thereunto belonging.

"The consideration above mentioned and referred to is the payment to me by the said James McMillan & Co. of the sum of thirty-five hundred dollars, and the further payment of the taxes duly assessed upon said real estate between the second day of August, 1879, and the date of the execution and delivery of said deed. Said payments to be made at the time of the execution and delivery of said deed, unless otherwise agreed to by said James McMillan & Co. and myself.

"It is hereby expressly understood and agreed that in case of a violation of the lease under which the said James McMillan & Co. now hold said real estate, I am to be released from any and all promises contained and by me made in this instrument.

"Witness my hand this sixth day of October, 1879, the same being the date of this instrument. E. B. AMES. [Seal.]"

By the terms of this instrument, which is admitted to have been sealed by defendant, he covenanted to convey the premises upon the consideration and condition of the payment by the covenantees of the sum named, on or before the date fixed in the writing. Before performance on their part the defendant notified them of his withdrawal and rescission of the

promise and obligation embraced in such written instrument, and thereafter refused the tender of payment and offer of performance by the plaintiff in conformity therewith, as alleged in the complaint, and within the time limited. On the trial, it appearing that such notice of rescission had been given, the Court rejected plaintiff's offer to introduce the writing in evidence, and dismissed the action.

The only question presented on this appeal is whether plaintiff's promise or obligation was *nudum pactum* and presumptively invalid for want of a consideration, or whether, being in the nature of a covenant, the defendant was bound thereby, subject to the performance of the conditions by the covenantees.

Apart from the effect of the seal as evidencing a consideration binding the defendant to hold open his proposition, or rather validating his promise subject to the conditions expressed in the writing, it is clear that such promise, made for a consideration thereafter to be performed by the plaintiff at his election, would take effect as an offer or proposition merely, but would become binding as a promise as soon as accepted by the performance of the consideration, unless previously revoked or it had otherwise ceased to exist: Langdell on Cont. § 70; *Boston & M. R. R. v. Bartlett*, 3 Cush. 224, 228. In the case cited there was a proposition to sell land by writing not under seal. The Court held the party at liberty to withdraw his offer at any time before acceptance, but not after, within the appointed time, because until acceptance it was a mere offer, without a consideration or a corresponding promise to support it, and the Court say: "Whether wisely or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached."

If, however, his promise is binding upon the defendant because contained in an instrument under seal, then it is not a mere offer, but a valid promise to convey the land upon the condition of payment. All that remained was performance by plaintiff within the time specified to entitle him to a fulfilment of the covenant to convey: Langdell on Cont. §§ 178, 179. As respects the validity or obligation of such unilateral contracts, the distinction between covenants and simple contracts

is well defined and established: *Anson*, Cont. 12; *Chit. Cont.* 5; *Leake*, Cont. 146; 1 *Smith*, Lead. Cas., 7th ed. 698; *Wing v. Chase*, 35 Me. 260; *Willard v. Tayloe*, 8 Wall. 557.

In *Pitman v. Woodbury*, 3 Exch. 4, 11, *PARKE*, B., says: "The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself never did; for he is a party, although he did not execute, . . . and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration:" *Morgan v. Pike*, 14 C. B. 473, 484; *Leake*, Cont. 141. The covenantee in such cases may have the benefit of the contract, but subject to the conditions and provisos in the deed. These obligations frequently take the form of bonds, which is only another method of forming a contract, in which a party binds himself as if he had made a contract to perform, a consideration being necessarily implied from the solemnity of the instrument. The consideration of a sealed instrument may be inquired into; it may be shown not to have been paid: *Bowen v. Bell*, 20 John. 338; or to be different from that expressed: *Jordan v. White*, 20 Minn. 77 (91); *McCrea v. Purmort*, 16 Wend. 460; or as to a mortgage that there is no debt to secure: *Wearse v. Peirce*, 24 Pick. 141, etc.; but except for fraud or illegality the consideration implied from the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty.

It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the Court in such a case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the rem-

edy, and all his rights under the contract. The inquiry would not in such case be directed to the constructive consideration evidenced by the seal, for a mere nominal consideration would have supported defendant's offer or promise upon the prescribed conditions: *Leake*, Cont. 17, 18; *Western R. Co. v. Babcock*, 6 Met. 346; *Yard v. Patton*, 13 Pa. St. 278, 285; *Candor's Appeal*, 27 Id. 119.

If, then, defendant's promise was irrevocable within the time limited, plaintiff might certainly seek his remedy for damages, upon the facts alleged in the pleadings, upon showing performance or tender thereof on his part.

There is a growing tendency to abrogate the distinction between sealed and unsealed instruments; in some States by legislation, in others to a limited extent by usage or judicial recognition: *State v. Young*, 23 Minn. 551; 1 Pars. Cont. 429. But the significance of the seal as importing a consideration is everywhere still recognized, except as affected by legislation on the subject. It has certainly never been questioned by this Court. In Pennsylvania the Courts allow a party, as an equitable defence in actions upon sealed instruments, to show a failure to receive the consideration contracted for, where an actual valuable consideration was intended to pass, and furnished the motive for entering into the contract: *Candor's Appeal*, 27 Pa. St. 119; *Yard v. Patton*, *supra*. But whatever the rule as to equitable defences and counter-claims under our system of practice may properly be held to be in the case of sealed instruments, it has no application, we think, to a case like this, where full effect must be given to the seal. Under the civil law the rule is that a party making an offer, and granting time to another in which to accept it, is not at liberty to withdraw it within the appointed time, it being deemed inequitable to disappoint expectations raised by such offer, and leave the party without remedy. The common law, as we have seen, though requiring a consideration, is satisfied with the evidence thereof signified by a seal: *Boston & M. R. R. v. Bartlett*, *supra*. The same principle applies to a release under seal, which is conclusive, though disclosing on its face a consideration otherwise insufficient: *Staples v. Wellington*, 62 Me. 9; *Wing v. Chase*, 35 Id. 260.

These considerations are decisive of the case, and the order denying a new trial must be reversed.

SMITH ON CONTRACTS, 7, 165.

· Van Valkenburg v. Smith, 60 Maine, 97 ; Dorr v. Munsell, 13 Johnson, 430 ; Page v. Trufant, 2 Mass. 159.

Such instruments may be avoided on the ground of fraud or duress in connection with their execution, or because the consideration was unlawful, but not on the ground that there was no consideration. See cases above.

Consideration in deeds is of two kinds, *good* or *valuable*.

A *good* consideration, such as natural love and affection, is sufficient to support a deed between the parties thereto, and against all other persons generally except the creditors of the grantor or bona fide purchasers for value.

STOVALL v. BARNETT'S EX'RS.

Court of Appeals of Kentucky, 1823.

4 Littell, 208.

OWSLEY, J. This was an action of covenant, brought in the Court below against the executors of Thomas Barnett, deceased, by Stovall and his wife, upon the following deed executed by the testator in his lifetime to Mrs. Stovall, whilst she was a *feme sole* by the name of Betsy Saunders.

“ Know all men whom it may concern, that for and in consideration of the good-will and affection which I bear unto my daughter's daughter, Betsy Saunders, and daughter of my deceased daughter, Lucy Saunders, I give and bequeath two negro women, they being the same I formerly lent said Lucy, one by the name of Moll, the other Phillis, each about eighteen or twenty years of age, with their increase, and will forever defend the right, title, and claim to said negroes, to said Saunders, her

heirs and assigns forever, under the penalty of two thousand dollars, as witness my hand and seal this 7th of March, 1808.

“THOMAS BARNETT, [Seal.]”

The Court below sustained the demurrer of the defendants, which was filed to the plaintiffs' declaration.

The question decided by that Court, and which is now presented for the consideration of this Court, is whether or not the consideration expressed in the deed from the testator to Mrs. Stovall is a sufficient one to authorize the plaintiffs to maintain their action for a breach of the covenant contained in the deed to defend the right, title, and claim to the negroes.

The affirmative of this question was in effect decided by this Court in the case of *M'Intire v. Hughes*, 4 Bibb, 186. In that case the proximity of blood between a father and his son was held to be a sufficient consideration to authorize a Court of Equity to decree a specific execution of a bond for the conveyance of land given by the former to the latter. It is true that was a case in equity, whereas the present case is an action at law; but it should not be forgotten that a Court of Equity cannot, consistently with its general practice, decree the specific execution of a contract upon which there could be no recovery at law. There are cases of a peculiar and extraordinary character where Courts of Equity may decree the specific execution of contracts, though no action at law could be thereon maintained; but those are cases which form exceptions to the general rule by which equity is controlled, and the case cited was not decided upon the principle of its falling within any of the exceptions. It was decided on the broad and general common law principle, that the proximity of blood between the father and son formed a sufficient consideration to uphold the bond; upon which damages might have been recovered at law, and which, for the purpose of more substantial relief, ought to be specifically decreed in equity.

If, therefore, the decision in the case cited be correct (and that it is, we still entertain no doubt), it follows that, upon common law principles, the consideration expressed in the deed upon which this suit is founded must be sufficient to authorize the plaintiffs to sustain their action. For although the deed in this case was not given by a father to his son, it was given

to the granddaughter by the grandfather, and must be admitted to have derived the same force and effect from the consideration of blood as if had been given by a father to his child.

But admitting the consideration sufficient as at common law, it may possibly be thought by some that it ought not to be so adjudged under the Act of the Legislature of this country of 1801. The sixth section of that Act provides that "whenever any suit is depending in any of the Courts of this Commonwealth, founded on any writing under the seal of the person to be charged therewith, it shall and may be lawful for the defendant or defendants therein, by a special plea, to impeach or go into the consideration of such bond, in the same manner as if the said writing had not been sealed, any law to the contrary notwithstanding:" 1 Dig. L. K. 257.

By thus permitting the consideration of deeds to be gone into, it surely never can have been intended by the Legislature to do away or in any manner lessen the effect of any previous valid consideration. Were it admitted that such was the intention of the Legislature, the consequence would be a total annihilation of all deeds. For the Act has nowhere discriminated between considerations which may, and such as may not, support a bond, and that construction which would defeat a recovery upon a bond based upon any previous valid consideration must necessarily be carried out to the destruction of all bonds, be the consideration what it may. The consideration of all deeds may be inquired into, and if, from the mere circumstance of allowing that inquiry, any consideration which would have been previously sufficient to give force and effect to deeds be adjudged now incompetent for that purpose, the same change must be adjudged to have been produced upon the most valuable consideration, and all deeds reduced to mere shadows. But the truth is that the Act has wrought no change in the consideration of deeds; it has barely allowed the consideration to be gone into and impeached, leaving its validity to be tested by the principles of law in force at the passage of the Act.

We know that since the passage of the Act it has been held competent for a defendant in an action founded on a bond by special plea to deny that it was given upon any consideration; and that decision we still think perfectly compatible with the

true spirit and object of the Act. For a purely voluntary bond derives no aid from any consideration, and when the fact of its having been given without consideration is made appear by special plea, the rule *quod ex nudo pacto non oritur actio* aptly applies. It is true that at common law this rule was not made to apply to deeds; but its application to contracts of that sort was denied, because from the solemnity of sealing and delivery a consideration was always implied, and the defendant was estopped to affirm by plea anything contrary to the manifest solemnity of contracting. Under the Act of this country, however, a party is not concluded by this artificial implication resulting from the solemnity of contracting; but a defendant may now by special plea go into the consideration, and when the fact of a deed being purely voluntary is made to appear, the application of the rule to which we have referred may with propriety be made.

It results, therefore, that the Court below erred in sustaining the defendants' demurrer to the plaintiffs' declaration. But as the parties have agreed that the judgment of that Court should not be reversed, if this Court should be of opinion that nominal damages only are recoverable upon such a covenant as that contained in the plaintiffs' declaration, it is proper to remark that we are not of opinion that the mere circumstance of the covenant having been given by the testator in consideration of natural love and affection precludes the plaintiffs from recovering more than nominal damages.

The judgment must be reversed, with costs, the cause remanded to the Court below, and further proceedings there had not inconsistent with this opinion.

McIntire v. Hughes, 4 Bibb, Ky. 186; Hanson v. Buckner's Ex., 4 Dana, Id. 251; Bell v. Sccommon, 15 N. H. 381; Stafford v. Stafford, 41 Texas, 111; Jackson v. Sebring, 16 John. 515; Langdell on Contracts, §§ 46, 47.

But a *good* consideration will not support an *executory* contract.

FINK v. Cox.

Supreme Court of New York, 1820.

18 John. 145.

SPENCER, Ch. J. The question in this case is whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given that he intended it as an absolute gift to his son, the plaintiff, alleging that the plaintiff was not so wealthy as his brothers; that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff.

There can be no doubt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration: 17 Johns. Rep. 301, *Schoonmaker v. Roosa and De Witt*. The only consideration pretended is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not.

It is conceded that the gift in this case is not a *donatio causa mortis*, and cannot be supported on that ground. In *Pearson v. Pearson*, 7 Johns. Rep. 26, the question was whether the gift of a note signed by the defendant to the plaintiff was such a vested gift, though without consideration, as to be valid in law. We held that it was not, and that a parol promise to pay money as a gift was no more a ground of action than a promise to deliver a chattel as a gift; and we referred to the case of *Noble v. Smith*, 2 Johns. Rep. 52, where the question underwent a full discussion and consideration. The case of *Grangiac v. Arden*, 10 Johns. Rep. 293, was decided on the principle that the gift of the ticket had been completed by

delivery of possession, and is in perfect accordance with the former cases.

It has been strongly insisted that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is undoubtedly a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed against all persons but creditors and *bona fide* purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a *locus pœnitentiæ*. It was an engagement to give, and not a gift. None of the cases cited by the plaintiff's counsel maintain the position that because a parent, from love and natural affection, engages to give his son money, or a chattel, that such a promise can be enforced at law.

Judgment for the defendant.

Smith v. Kittridge, 21 Ver. 238; Phillips v. Frye, 14 Allen, 36; Whitaker v. Whitaker, 52 N. Y. 363.

VALUABLE CONSIDERATION.

A valuable consideration, such as money, or other thing of a money value, is necessary to sustain the deed of a bona fide purchaser, or, in certain cases, to sustain it against the creditors of the grantor.

WASHBAND *v.* WASHBAND.

Supreme Court of Connecticut, 1858.

27 Conn. 424.

STORRS, C. J. The only question made before us, on the argument of this case is, whether the conveyances under which the defendant below claimed title to the demanded premises were valid against the claim of title set up by the plaintiff under the levy of his execution, which was subsequent to those conveyances.

It is conceded that all the proceedings under that execution appear, from the finding of facts by the Court below, and on which its judgment was based, to have been in all respects regular, and that they are in form unexceptionable; and also that the debt for which the judgment was rendered on which that execution issued, accrued to the plaintiff prior to the execution of the deeds by Sterling Washband, who was the former owner of the land in controversy, and under whom both parties claimed title to it. No objection is made by the plaintiff to the form of those deeds, and it is conceded that they constituted by their terms a conveyance to him of all the interest of the grantor in the land which they purported to convey, and which embraced the land in controversy. Hence, if such conveyance is not good against the claim of the plaintiff under his execution, it must be because it is rendered invalid by the circumstances under which it was made. It is not found by the Court below, nor has it been claimed by the plaintiff, that these deeds were executed with any fraudulent or improper intent on

the part of any of the parties to them ; nor are they attempted to be impugned on that ground. It appears from the finding below that there was evidence which would be relevant on the question whether there was actual fraud in the execution of those instruments. We refer more particularly to the evidence going to show the inadequacy of the consideration which was paid for the land conveyed by those deeds. It was, however, evidence only conducing to prove actual fraud, but was not conclusive on that point, and was to be considered and weighed on such a question, if it had been made, by the Judge alone who tried the case. It is sufficient for us that the fact or fraud which might have been involved in it is not found, and therefore does not appear as a fact in the case. We do not mean to intimate any opinion as to whether, on the facts as they appear from the finding, the conduct of the plaintiff in regard to the deeds would furnish an answer to a claim of fraud made by him, if he had interposed such a claim. It is unnecessary to express an opinion on that point.

The only ground on which the plaintiff below claims to avoid the deeds in question is, that they were voluntary conveyances only, made on no valuable consideration, and that they were therefore constructively fraudulent to him, a prior creditor of the grantor. We are of the opinion that they were not conveyances of that description. On the facts found it appears that they were given for a valuable consideration, which, however inadequate, and in that respect evidential of actual fraud, relieves them from the imputation of being voluntary, which implies the total want of a substantial consideration. It is found that the defendant and his sister Mary, to the latter of whom the property of the grantor not embraced in the deeds to the defendant was conveyed at the same time when the conveyance was made to the defendant, agreed with the grantor, in consideration of the conveyances, to pay two debts, amounting to fifty-five dollars, then due from the grantor to other persons, and that they have since, in pursuance of that agreement, paid those debts. That the payment of a debt of the grantor as much constitutes a valuable consideration as the payment to him directly of a sum of money, can not be questioned. If indeed the amount of the consideration were

only nominal, it would be unavailing against the plaintiff; but in this case we perceive no ground on which we can pronounce the payment of the debts of the grantor to be nominal only; and to consider the payment of a debt due by him, and to the payment of which he would otherwise be subjected, to be so, would be absurd. Nor does the fact that the defendant, as well as his sister, were minors when they agreed to pay those debts, render the consideration for the conveyances nominal or worthless; because that agreement on their part was not void, but only voidable; and it appears that, so far from ever having avoided it, they have since performed it by paying those debts. This short but decisive view of the case renders it unnecessary to consider the further question made before us, whether, if the conveyance to the defendant had been voluntary, that circumstance would be sufficient to postpone his claim under it to that of the plaintiff. That conveyance having been made for a valuable consideration and without fraud, it is of course good, not only between the parties to it, but against the plaintiff, a prior creditor of the grantor, who, when it was executed, had taken no legal steps to appropriate the land conveyed to the payment of his debt. And the conveyance being of that character, the case of *Waterhouse v. Benton*, 5 Day, 136, on which the plaintiff has relied, is obviously inapplicable to the present. In that case the only question was, whether a voluntary conveyance made by the advice and at the request of a creditor of the grantor, is by such advice and request rendered valid against that creditor; but that decision does not apply to an honest conveyance for a valuable consideration, the validity of which plainly could not depend on the fact on which the conveyance in that case was sought to be sustained.

The judgment complained of is therefore erroneous.

In this opinion the other Judges concurred.

Judgment reversed.

Keys v. Test, 33 Ill. 317; *Dickson v. Tillinghast*, 2 Paige, 215; *Delancey v. Steavens et al.*, 66 N. Y. 157.

SIMPLE CONTRACT.

A *valuable* consideration is, as a general rule, necessary to sustain a simple contract.

BURNETT v. BISCO.

Supreme Court of New York, 1858.

4 John. 235.

PER CURIAM. A defect in substance in this declaration is that there is no consideration stated. The defendant agreed to give the refusal of the farm to the plaintiff; but he did not agree to take it, and there was no promise on his part as a consideration for the promise of the defendant, nor any money paid or other valuable consideration given. The agreement was a mere *nudum pactum*. A consideration is as necessary to an agreement reduced to writing as if it remained in parol: 1 Saund. 211, note 2. There must be judgment for the defendant.

Judgment for the defendant.

To the same point.

CONOVER v. STILLWELL.

Supreme Court of New Jersey, 1869.

34 N. J. L. 54.

DEPUE, J. The validity of the contract sued on is denied for the want of a consideration to support it. The money mentioned being payable on a contingency, the instrument is not a promissory note. As a consequence, a consideration will not be implied from the form of the instrument, and the plaintiff, to establish his right to recover, must aver and prove the consideration on which the contract was founded.

Even in the case of a promissory note, the words "value received" only import a consideration so as to relieve the party from proving it in the first instance; and it is well settled that the consideration may be inquired into, and if a want of consideration is shown, the plaintiff cannot recover. The circumstances attending this transaction are all before the Court, and the inquiry will be whether they show a consideration which will give to the contract any legal efficacy.

The general principle underlying this subject is well settled. Its application in some cases is a matter of difficulty, but in this case it is easily applied to the facts agreed upon in this state of the case.

The consideration, to support a promise, may be either a benefit accruing to the promisor, or a loss or disadvantage to the promisee.

A consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other party, is a valuable consideration: Story on Contracts, § 429; 1 Parsons on Contracts, 431. But to give a consideration value sufficient for the support of a promise, it must be either such as deprived the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he could not otherwise have had. Thus part payment of a debt overdue is not a valid consideration for an agreement to postpone or discharge the payment of the residue: *Pabodie v. King*, 12 Johns. R. 426; *Reynolds v. Ward*, 5 Wend. 501; *Gibson v. Renne*, 19 Id. 389; *Smith v. Bartholomew*, 1 Metc. 276; *Deacon v. Gridley*, 15 C. B. 295.

So a promise to pay increased compensation for services which the party was under a prior legal obligation to render, is not valid: *Stilk v. Myrick*, 2 Camp. 317; *Harris v. Carter*, 3 E. & B. 559; *Voorhees v. Woodhull's Ex'rs*, Court of Errors, March Term, 1869, 4 Vroom, 494.

The relinquishment of a security deposited by a debtor with his creditor as collateral security for a debt, which was afterwards discharged by a composition deed, is no consideration for a promise by the debtor to pay the residue of the debt beyond the amount of the composition; the debt being released and the debtor entitled to the return of the security, the cred-

itor cannot make its surrender a consideration of a new promise : *Cowper v. Green*, 7 M. & W. 633 ; *McDonald v. Neilson*, 2 Cow. 140 ; *Crosby v. Wood*, 2 Seld. 369.

In this case the Conovers, at the making of this contract, were under a prior legal obligation, by virtue of the mortgage given for a portion of the purchase-money, to pay the money which they were induced to pay by the defendant's undertaking.

The performance of this obligation neither gave the defendant nor the assignee of the mortgage a benefit to which he was not previously entitled, nor did it deprive the Conovers of anything which they were not previously bound to render. The performance by the plaintiff of what he was under a prior legal obligation to perform in the manner and at the time stipulated in the mortgage, is not a sufficient consideration to support the new contract he obtained from the defendant at the time of performance.

It was argued by the plaintiff's counsel that this contract might be upheld by placing it on the ground that it was the result of a compromise between the parties of a claim made by the plaintiff, the right whereof was in doubt.

The evidence before the Court affords not the slightest pretext whereon to form a claim of an abatement or indemnity for a defect in the title conveyed. Of the existence of any title in another there is no legal evidence whatever. Nothing but the loosest neighborhood rumor is produced to raise the probability or possibility of an outstanding title to a portion of the premises.

A compromise of a doubtful claim is, in law, a sufficient consideration to support a promise, whatever the actual rights of the parties may have been. What substance there must be in a claim to make a compromise of it, unless it is actually in suit, a valid consideration, has occasioned great contrariety of decision.

The cases are carefully collected in the American notes to *Stapleton v. Stapleton*, 3 White & Tudor's Lead. Cas. (5th Am. ed.) 406 ; *Farmers' Bank of Amsterdam v. Blair*, 44 Barb. 641 ; *Cabot v. Haskins*, 3 Pick. 83.

But whatever conflict there may be in the cases as to the character of the claim which entered into the compromise,

there is no controversy that the claim, whatever it was, must be extinguished or discharged. Its extinguishment by force of the compromise is the benefit accruing to the promisor which gives to it the effect of a consideration.

What claim on the part of the Conovers was compromised, released, or discharged in this arrangement? An adverse claim actually set up to a portion of the land conveyed to them would have been no defence to a recovery of the mortgage debt unless they had been actually evicted from a portion of the mortgaged premises, or an action was then pending against them for the recovery of it: *Glenn v. Whipple*, 1 Beas. 50; *Long's Adm'r v. Long*, 1 McCarter, 462. The covenant of warranty in the deed from the defendant to them had been transmitted by their conveyance of the premises to a third party. The covenants for seizin and against encumbrances were left in full force. Whatever liability the defendant incurred to answer for defects of title sprang from these covenants. Neither the Conovers nor their grantee had any claim against the defendant with respect to any outstanding title, except by and through these covenants. These covenants were unaffected by this pretended compromise, and still remain in full force—not discharged, released, or extinguished. Nor was it any part of the arrangement that the Conovers should purchase and extinguish the outstanding title, which was the pretence under which they claimed additional indemnity. That title, whatever it then was, it still is, and no claim which the Conovers, at the time of this agreement, might have made, or they or their grantee might in the future make, against the defendant by reason of it, was relinquished as a consideration of the agreement of the defendant. The entire effect of the arrangement was to leave the legal rights of the parties just what they previously were. A promise made under such circumstances will not create a legal cause of action.

The plaintiff should have been nonsuited. The Circuit Court is advised accordingly.

SMITH ON CONTRACTS, 166.

Ames v. Taylor, 49 Maine, 381-558; *Dorwin v. Smith*, 35 Vet. 69; *Newhall v. Paige*, 10 Gray, 366.

As to Commercial Paper, see *Smith on Contracts*, § 181.

While there must be a consideration of some value, its amount is not, as a rule, material.

WORTH *v.* CASE.

Court of Appeals of New York, 1870.

42 N. Y. 362.

FOSTER, J. The will of Theron B. Worth was given in evidence before the referee, and it contained various devises and bequests which I have not set forth specifically; but in the view which I take of the case, I deem them to be entirely immaterial.

The transfer of the note from the testator to the plaintiff was not in the nature of a gift *causa mortis*; for independent of its being founded upon *some* consideration, the testator, when he executed it, was not the subject of any physical malady which would be likely to end in his death, or from which he had any apprehension that his death would ensue. Neither was it an absolute gift, *inter vivos*, because there was *some* consideration for it, and because also the delivery of it was a conditional one. It was subject to revocation by the maker at any time during his life; and it was also subject to the further condition that the plaintiff should not open the envelope in which it was delivered to her until after his death. It was not intended by the maker as a testamentary bequest; for long after its original delivery to the plaintiff, and after he had subsequently had it in his possession, and returned it to her, in the will which he made he bequeathed to her the use (while she remained single) of \$1000, without any intimation that it was in lieu of the note, and without any reference to it, and without any attempt on his part then or thereafter to reclaim it from her possession. It was, therefore, manifestly his *intent* that the note should be hers as well as the bequest.

A deed executed and delivered by a grantor which is to take effect so as to pass the title at his death is not in any sense a testamentary disposition of the property described in it; nor

is a note executed and delivered and accepted in the lifetime of the maker, but made payable at or after his death, such a disposition of it; but in both cases the instrument is absolute, and passes the right to the land in the one case, and to the money in the other, to vest in possession or action at the death of the grantor or maker. And if the note in question was delivered and accepted, the transaction is no more testamentary than in the cases of the deed and note referred to; and the only difference is that in those the delivery passed the right without power of revocation and without condition; while in this the power of revocation and the condition continued till his death. I think there are but two questions in the case.

The *first* is whether the delivery in the manner and with the conditions specified, and under all the circumstances of the case, was such that if the note was founded upon a sufficient valuable consideration it would on his death constitute a valid and legal claim against his estate; and if so, then, *second*, was there such a consideration expressed and proved by parol as would make the note a valid demand if the delivery had been absolute and unconditional.

I think the circumstances show that the maker of the note delivered it to her with the intention that it should be hers absolutely, unless he should thereafter apply to her for its redelivery, or unless she should open the envelope during his life. Or, in other words, that he intended to pass the title in it to her, subject to being divested (as she had the possession) by either of those acts; and that if neither of them were performed, the title to the note should remain in her. It was not delivered to her as an *escrow*, for *such* a delivery must be made to some third person; and, as a general rule, an *escrow* is made to await some affirmative action on the part of the other party before he is entitled to the absolute delivery of the instrument, and not the affirmative action of the party who delivers it as an *escrow*. The delivery, therefore, was complete, provided there was an acceptance by her.

There is no doubt that a delivery of a deed or note, or other obligation, to one person in favor of and for the benefit of another constitutes a valid and binding delivery as against the party who delivers it, whether the party in whose favor it is de-

livered is owner of it or not ; and for the purpose of protecting his interests the law holds the party receiving the delivery as his trustee, and makes his acceptance of it the acceptance of the beneficiary. And this, too, whether the person receiving the delivery knows the contents of the instrument or not, and whether he does anything more than merely receive it or not. And yet where the person in whose favor the instrument is executed will be injured by the acceptance of it, the delivery to such third person does not bind *him*, unless he authorized such acceptance or adopts it by some subsequent act.

The same is the case with an instrument executed and delivered personally to an idiot or lunatic. If beneficial to him, the party executing it is bound by it, and the idiot or lunatic is entitled to its benefits ; but if against his interests, he is not bound, although he has received the delivery. In these cases the delivery is held good, though the grantee or obligee really had nothing to do with the transaction in order to carry out the intent of the party who executed the instrument and for the benefit of the party for whose benefit it was delivered, and constitutes an acceptance on his part when for his interest to do so, and not when otherwise.

Upon what principle is it then that a direct delivery of an obligation to the obligee himself and a reception thereof by him do not constitute an acceptance, if the contents of the instrument delivered are not at the time known to him ?

And why may not a party deliver an instrument, the contents of which are not known to the party receiving it, with the like effect as if it were, without his knowledge, delivered for his benefit to some third person for him ?

Or suppose that on the 30th day of January, 1864, Theron B. Worth had been indebted to the plaintiff in the exact sum of \$10,000 ; and had on that day delivered the note in question precisely as he did, and it had remained in the possession of the plaintiff as it did till his death, is it possible that the plaintiff could not maintain an action on the *note*, and that she would have been compelled to count on the original indebtedness. To my mind, the delivery and acceptance were more complete than in any of the other cases to which I have alluded. The delivery was to the party to be benefited ; and

from what appears it is manifest that when she received it she considered it to be something which was of value to her. He had told her that he would pay her well for the services performed for him, and had offered to buy her a house and lot in compensation; and when she received it, on the day when he left her to return to his home, she could not doubt that it contained the compensation, or the evidence of it, which he had promised to make to her; and no doubt she gladly accepted it as such, in the full belief that it contained a generous compensation.

As nothing happened subsequently to the delivery which would invalidate the note, the next question is, were the conditions such as to render it therefore void *per se*?

By the terms of the delivery it was intended to be valid if neither of two affirmative acts were afterward done. It is clear that neither of these acts was performed, and in my judgment the delivery and acceptance were sufficient, and the note as such remained valid in the hands of the plaintiff, provided it was executed for a good consideration.

To support a note or other contract it is not necessary that the consideration therefor shall be equal in pecuniary value to the amount of the obligation incurred by the note or contract. It is enough, generally, that no part of the consideration upon which it was founded was wanting at the time the obligation was incurred, and that no part of it has subsequently failed. And as to all considerations founded upon specific articles of property parted with by the obligee to the obligor, and which have not a specific, fixed, and certain pecuniary value, the Court, upon the question of consideration, will not inquire into their actual pecuniary value, but will leave the parties to such estimates thereof as they have formed in making their contract.

If one voluntarily and fairly purchases real or personal property of another at a fixed price, and executes his note for the payment of the purchase-money, he will not be allowed when sued thereon to prove, for the purpose of defeating or reducing the amount of the recovery on the note, that the property in fact was not worth one-half, or one-quarter, or even one-tenth of the amount at which he purchased it.

If one contracts with another that he shall walk from Albany to Niagara Falls, or for any other service to be performed by

him, and agrees to pay him therefor the sum of \$1000 if the service is performed, he will not be allowed to interpose as a defence, if sued upon the contract, either that the service was not pecuniarily worth that sum to the party for whom it was performed, or that *he* received no actual benefit from such performance by the other party.

So, too, while the payment of a less amount in money for a larger debt which is due, and the taking a receipt therefor from the creditor expressing that it is in full payment, does not amount to an accord and satisfaction, yet the acceptance of an article or articles of property and receipting them as in full does amount to an accord and satisfaction, though their actual value is far less than the debt upon which they are received. These principles are elementary and familiar.

The note contains the declaration of the testator that his agreement to pay her the \$10,000 was in consideration of services rendered to him. He was very sick; but precisely how sick he was, or how dangerous his disease was, we do not know. We do know that he received a great deal of care and attention, and that she bestowed it upon him; and that while she was bestowing such care and attention upon him he frequently said he would pay her well for her services. It may well be that his life was considered in danger, and that he desired to stimulate her efforts in his behalf by means of pecuniary considerations, even beyond those which, as his sister, he could expect from her. And he may well at that time have estimated her services and attention as worth more to him than \$10,000. "For all that a man hath will he give for his life." At all events, it is clear that she was unremitting in her attentions to him, and he recovered. And if the note speaks truly, he then considered those attentions worth \$10,000 to him. It is true that in the manner of delivering it to her he reserved the *locus penitentiæ* in case he should afterward consider her services of less value to him; but he lived more than three years after that, and if his acts during that time are evidence of his opinion, he continued to believe to the end of his life that in giving the note for that consideration he had not committed a mistake. He chose for these services to execute the note. We

have no pecuniary standard by which we can measure or weigh their value to him. He estimated them then, and continued to do so, at \$10,000, and those who stand in his shoes have no right to repudiate the contract which he made.

I think the note was executed for a valuable consideration, and that it is valid against his executors.

The order of the General Term should be affirmed, and final judgment should be ordered for the plaintiff for the full amount specified in the note, with interest thereon from the 15th day of October, 1867 (when the claim of the plaintiff was made upon the defendant), together with her costs of the action to be paid out of the estate of the deceased.

Hubbard v. Coolridge, 1 Met. 84-93 ; *Earle v. Peck*, 64 N. Y. 596 ; *McArtee v. Engart*, 13 Ill. 242-8 ; *Eyre v. Potter*, 15 How. 42-59.

Marriage has been held to be a valuable consideration.

PECK *v.* VANDEMARK.

Court of Appeals, New York, 1885.

99 N. Y. 29.

EARL, J. The eleven letters put in evidence which passed between the plaintiff and the testator, commencing on the 4th day of October, 1879, and ending on the 3d day of December thereafter, all related to the same subject, to wit, the marriage of the parties and the terms upon which it should be consummated. The whole correspondence was to settle the pecuniary compensation which the plaintiff was to have in consideration of her marriage to the testator. He distinctly proposed to give her by will one-half of the entire property which he should leave at his death, and the use of the other half thereof for her life. She finally accepted the proposition, and, relying upon the agreement thus made, married him, and subsequently lived with him. These letters furnish the written evidence of the agreement required by the Statute of Frauds ; and it matters

not that the whole agreement may not be contained in one letter. The entire proposition, however, on the part of the testator was in one letter, and her acceptance thereof in another. All the letters taken together show clearly what the agreement was, and they are all connected and related to each other, and thus all of them may be considered for the purpose of ascertaining what the agreement was. In 1 Greenleaf on Evidence, Redfield's ed., § 268, the learned author says: "It is sufficient if the contract can be plainly made out in all its terms from any writings of the party, or even from his correspondence, but it must all be collected from the writings." In Wharton on Evidence, § 872, it is said: "It is enough in order to meet the requirements of the statute, if the substance of the contract is to be inferred from writings, either by the parties or by their agent, though the writings are made up of disjointed memoranda or protracted correspondence." In Reed on the Statute of Frauds, § 341, it is said: "The memorandum required by the Statute of Frauds may be on different papers, one of which must contain a reference to the other;" and in Schouler's Domestic Relations, § 177, it is said: "Letters or correspondence before marriage may establish an ante-nuptial settlement where they sufficiently furnish the terms of the agreement."

This contract was founded upon a sufficient consideration. The plaintiff, in order to marry the testator, was obliged to surrender the pension which she was receiving from the government, and this the testator knew. Both the surrender of the pension and the marriage itself furnished ample consideration for the promise of the testator: Schouler's Domestic Relations, § 173; *Maguiac v. Thompson*, 7 Peters, 348; *Wright v. Wright*, 54 N. Y. 437. The ante-nuptial agreement was, therefore, good in form and founded upon a sufficient consideration, and bound the testator.

As the testator did not perform his agreement, the plaintiff was entitled to recover against his executor damages for the breach thereof. Although in the correspondence between them he represented that his property was worth \$10,000, that value did not enter into the contract. All he agreed to give her was

one-half of all the property he should leave at his death and the use of the other half for her life. He did not agree to appoint her executrix of his will, and as she could receive her interest in the personal property in case he had kept his promise only through regular administration of his estate, the value of his promise is to be measured by taking as a basis the amount of the estate after the payment of debts and the expenses of administration, as the balance thus ascertained would be his entire property left at his death. It is not impossible to ascertain with sufficient accuracy the amount which the plaintiff is entitled to recover. The debts of the testator can be easily ascertained, and were ascertained substantially at the trial; and the expenses of administration could then also have been with sufficient accuracy determined. But if the exact amount of the testator's property could not at the time of the trial have been ascertained, the rights of the plaintiff could have been settled and determined by an interlocutory judgment and a reference ordered to take the accounting of the executor. The hearing upon such a reference could, if necessary, have been postponed until a final settlement of the executor's accounts before the surrogate. The form of this action furnishes no obstacle to such a method of disposing of the case. The facts are stated in the complaint and answer; they were proved upon the trial, and the Court then and there had all the powers in law and equity needed to administer justice between the parties. If in consequence of our decision it becomes necessary to assess the plaintiff's damages, such assessment may be postponed to give the executor sufficient time, if he needs it, to settle his accounts before the surrogate.

So, in any aspect of the case, it cannot be said that this action was prematurely commenced, or that there is any impossibility or even any great difficulty to ascertain the amount the plaintiff is entitled to recover, which, as before stated, is one-half of the estate absolutely after paying debts and expenses of administration, and the use of the other half during her life. The interest in the latter half may be computed by the annuity tables provided for such cases.

We are therefore of opinion that the decision of the Gen-

eral Term was right, and that its order should be affirmed and judgment absolute ordered against the defendant, with costs.

All concur.

Order affirmed and judgment accordingly

Wright v. Wright, 54 N. Y. 440 ; Rockafellow v. Newcomb, 57 Ill. 191; Frank's Appeal, 59 Pa. St. 194.

A mere promise to marry is a sufficient consideration to support a deed, even though the marriage is prevented by the death of the grantor : Smith v. Allen, 5 Allen, 454.

But a mere *moral obligation* has been held insufficient as a consideration to support a promise.

MILLS v. WYMAN.

Supreme Court of Massachusetts, 1825.

3 Pick. 207.

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiae* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed

of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice the party receiving ought to pay; but the Legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience

has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the Statute of Limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the Courts of Equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation; and it seems to follow that a promise founded upon such a debt has no legally binding force. .

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 B. & P. 249. The opinions of the Judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient

ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this Commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the Court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

Nor is a son legally bound to pay for necessaries furnished his indigent father, though after they were furnished he promised to do so: *Cook v. Bradley*, 7 Conn. 57.

But if the moral obligation was once a legal obligation, it will be sufficient to sustain a promise.

KEENER *v.* CRULL & WIFE.

Supreme Court of Illinois, 1857.

19 Ill. 189.

SKINNER, J. This was an agreed case. The plaintiffs sue, as husband and wife, for a debt due the wife when sole. The case shows that the wife, while sole and of full age, remained with her father, and worked in the family from 1833 to 1838; that in 1850, the father, who is the defendant's testator, in a conversation with one Longwith, said "that he had agreed to give his daughter (the now *feme covert* plaintiff with her husband) two hundred dollars per year for her work, and he had not paid her yet, and she had gone to Ohio." The debt, if one existed, was barred by the statute, and the question is whether, by reason of the admissions of her father in 1850, the plaintiffs are entitled to recover against his executor?

The great diversity of construction of like statutes, both in

the Courts of this country and of England, demands in this case the application of such rule as is consistent with our own decisions, and the current of modern adjudications.

The statute bars the action, and all remedy for recovery of the debt; and, when the bar is complete, the statute being interposed in defence, no action for the recovery of the debt can be maintained.

The debt, however, is not annihilated, and remains the same as before, except that all remedy for enforcement of the obligation is gone. The debt constituting an unquestioned moral obligation is, however, a good consideration to support a promise to perform that obligation; and a new promise, based upon this moral obligation, is binding upon the debtor in avoidance of the bar of the statute.

The new promise may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it, at the time acted upon and acceded to by the creditor, the promisee.

The following cases sustain the rule here laid down: *Ayers v. Richards*, 12 Ill. R. 146; *Bell v. Morrison*, 1 Peters R. 351; *Pool v. Relfe*, 23 Ala. R. 701; *Ten Eyck v. Wing*, 1 Michigan R. 40; *Brown v. State Bank*, 5 English (Ark.) R. 134; *Morgan v. Wolton*, 4 Penn. State R. 321; *Christy v. Flemington*, 10 Id. 129; *Shitler v. Bremer*, 23 Id. 413; *Hidden v. Couzins*, 2 R. I. R. 401; *Ventris v. Shaw*, 14 N. H. R. 422; *Reigne v. Despartes*, Dudley's R. 118; *Martin v. Brooch*, 6 Geo. R. 21; *Clark v. Dutcher*, 9 Cow. R. 674.

Like any other promise having legal force and sanction, it must be made to the party seeking its benefits, or to some one authorized to act for him. A promise to a stranger is insufficient to establish a promise to the plaintiff or the party whom he represents: *Kyle v. Wells*, 17 Penn. State R. 286; *Brailsford v. James*, 3 Strob. R. 171; *Martin v. Brooch*, 6 Geo. R. 21.

Were this a new question, we should hold that the action could alone be brought upon the new promise. But the current of authority and long usage sanction the practice of declaring upon the original cause of action, and of replying the

new promise in avoidance of the Statute of Limitations; and we do not feel at liberty to disturb a rule so well settled.

Tested by the rules stated, the plaintiffs cannot recover. The language of the defendant's testator was used to a stranger having no concern in the matter, or right to act for the party in interest, the amount of the debt was not named or in any manner indicated, nor was there any language unequivocally importing a present intention or undertaking to pay.

Judgment reversed.

Higgins v. Dale, 28 Minn. 126; Reed v. Batchelder, 1 Met. 559; Little v. Blunt, 9 Pick. 488; Allen v. Ferguson, 18 Wall. 1; Katz v. Moessinger, 110 Ill. 372; Young v. Perkins, 29 Minn. 173; Brisbin v. Farmer, 16 Id. 215.

A promise has been held a sufficient consideration for a promise.

FUNK v. HOUGH *et al.*

Supreme Court of Illinois, 1862.

29 Ill. 145.

BREESE, J. Two questions are made on this record: First, as to the sufficiency of the sheriff's return to the summons; and, second, the sufficiency of the special counts in the declaration.

The objection taken to the sheriff's return in this case has been so frequently made of late that we took occasion, at the last term of this Court in the Second Division, to review all the cases on the point with reference to the statutory requirement, and arrived at the conclusion that a return like this now before us was a good and sufficient return, and a literal and strict compliance with the statute: *Carriker v. Anderson*, 27 Ill. 358.

The objections taken to the special counts are not tenable. In both of them a consideration for the defendant's promise is formally set out, which was the promise and agreement of the

plaintiffs to receive and pay for the cattle which the defendant agreed to deliver; that they had paid a part of the price and were ready and willing to take the cattle and pay for them, according to the contract, of which the defendant had notice, but refused to deliver the cattle or return the money paid on them.

Promise for promise is a good consideration everywhere. The performance of the defendant did not depend on the prior performance of the plaintiffs. They were passive, only to act when the defendant should deliver the cattle. The delivery of the cattle on or before a certain day was a condition precedent to the performance of any act by the plaintiffs. When two acts are to be done at the same time, as where one agrees to sell and deliver and the other agrees to receive and pay, in an action for the non-delivery it is only necessary for the plaintiff to aver and prove a readiness to pay on his part, whether the other party was at the place ready to deliver or not: *Porter v. Rose*, 12 Johns. 208. That is this case.

Here the contract was to deliver the cattle by a certain day at Chicago, the defendant having the option to be paid as for gross weight or for net weight. The plaintiffs could not pay or tender the money until the weight, either gross or net, was ascertained, and that could be known on delivery. All this was precedent to the payment or tender of the money: *Hough v. Rawson*, 17 Ill. 588.

The cases cited by appellant's counsel have no application to the case made by these special counts. They are cases where the first act to be done was to be by the plaintiff.

Here the first act to be done was to be performed by the defendant, and his option determined as to the weight. The plaintiffs could not act until those acts were done.

The judgment of the Court below is affirmed.

Judgment affirmed.

Porter v. Rose, 12 Johnson, 208; *Coleman v. Eyre*, 45 N. Y. 38; *Philpot v. Gruninger*, 14 Wall. 570; *Briggs v. Tillotson*, 8 John. 304.

An *executed* consideration is not sufficient to support a subsequent promise.

DEARBORN v. BOWMAN.

Supreme Judicial Court of Massachusetts, 1841.

3 Met. 155.

SHAW, C. J. The defence to the action to recover the amount of this note is want of consideration. It is manifest from the note itself that it is not a negotiable instrument, being payable neither to order nor to bearer; indeed, it appears by the case that the defendant declined making it negotiable. But total want of consideration is a good defence even to an action on a negotiable note when brought by the promisee against the maker. Then the question is whether, upon the facts shown, any consideration appears for this promise. The note was given in consequence of services before that time performed by the plaintiffs in printing and circulating extra papers and documents, previously to an election of State senators at which the defendant was a candidate. Such services imposed no obligation, legal or moral, on the defendant; and it would be somewhat dangerous to hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election.

Nor were these services performed at the request of the defendant. On the contrary, it appears by the evidence that they were performed by General Staples, chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication, until long after the services had been performed. The rule of law seems to be now well settled—though it may formerly have been left in doubt—that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express

or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant: *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Id. 159; *Dodge v. Adams*, 19 Id. 429. As the services performed by the plaintiffs were not done at the request of the defendant; as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation.

Another ground, however, was taken in behalf of the plaintiffs, which was that the discharge by the plaintiffs of their legal demand against Staples was a good consideration for the defendant's promise to them. If such discharge was in fact given, and given at the defendant's request; or if the defendant had promised to pay if they would discharge Staples *pro tanto*, and they did discharge him, it would have been a good consideration for the defendant's promise. But there is no evidence to establish the fact.

The Court are of opinion that there was no legal consideration for the defendant's promise, and that no action can be maintained upon it.

Plaintiffs nonsuit.

SMITH ON CONTRACTS, § 194.

Bartholamew v. Jackson, 20 John. 28.

Nor will an executed consideration preceded by a request not implying a promise of recompense, be sufficient to sustain a subsequent promise.

ALLEN v. BRYSON.

Supreme Court of Iowa, 1885.

67 Iowa, 591.

SEEVERS, J. I. Preliminary to a consideration of the errors assigned, an objection to the abstract made by the appellee must be determined. The abstract states that "all the evi-

dence introduced, and all offers of evidence made, on the trial, together with all the objections made and exceptions taken by counsel, and all rulings of the Court upon said trial, and the entire record in said cause, is contained therein." In an abstract filed by appellee it is stated that appellant's abstract is not correct; that the evidence is not all contained in it in a condensed or other form; that it does not contain over one-third of the evidence taken on the trial, and that what it does contain is disconnected from the order in which it was introduced. We understand that no transcript has been filed, and we are not advised that one was demanded by the appellee. We therefore cannot determine whether the abstract is correct or not. This being so, the appellee insists that many of the errors assigned cannot be considered. But we think, under the circumstances above stated, the correctness of the abstract must be assumed. On its face it appears to be full and complete, and when it so states we think the appellee must, in an abstract filed by him, state wherein the one filed by the appellant is incorrect. We are aware that this rule in some instances casts upon the appellee a burden not contemplated by the rules of this Court in cases where the appellant purposely or negligently has filed an incorrect abstract. Experience, however, teaches us that in a majority of cases in this Court the correctness of the appellant's abstract is conceded, and in a large proportion of the remaining cases the corrections made therein by the appellee are easily made, and because of abundant caution. If we should hold that a simple denial of the correctness of the abstract has the effect to require us to examine the transcript, it is obvious that it would be made in every case. Because of the expense, the preparation and filing of the transcripts should not be encouraged. While this is so, the appellee, as a matter of right, may demand one, so as to enable him readily to ascertain whether the abstract is correct. Ordinarily this consideration is sufficiently strong to induce the appellant to prepare an abstract amply sufficient to enable the Court to determine the questions discussed by counsel. Experience also teaches us that in a majority of cases where the appellee files an abstract it could have been omitted without detriment. If the appellant purposely or negligently prepares an insufficient

or incorrect abstract, it is the fault of his attorney, and the Court, if its attention is called thereto, would endeavor to inflict such punishment as to prevent a repetition. The objections made to the abstract must be overruled.

II. The defendant pleaded as a defence that in February, 1881, which was after at least some of the services for which the plaintiff seeks to recover had been performed, he and defendant had an accounting and settlement of and concerning all their mutual claims and demands, and it was then found and agreed that plaintiff was indebted to the defendant in the sum of \$300; that the defendant at said time loaned the plaintiff \$300, and thereupon the plaintiff executed to the defendant a bill of sale, which was made a part of the answer, of certain personal property. The bill of sale shows that in consideration of \$600 the plaintiff sold the defendant the personal property described therein. The plaintiff, in a reply, pleaded that the sole and only consideration for the so-called bill of sale was the sum of \$300 advanced to plaintiff by the defendant; and also that the property therein described "was placed" in the hands of the defendant, or included in the bill of sale, in pursuance of an "oral agreement of the parties thereto, for the sole and only purpose of allowing the defendant to use, manage, and control the same during a temporary absence of the plaintiff from the State of Iowa;" and within six weeks thereafter the bill of sale was satisfied and the property turned over to the plaintiff. To this reply the defendant demurred on the ground that it sought to vary the terms of a written contract by parol. The demurrer was overruled. It should have been sustained. The general rule on this subject is well understood, and the only question is whether this case comes within it. The consideration stated in a written contract, it will be conceded for the purposes of this case, may be impeached and shown by parol to have failed in whole or in part, or to be illegal; but the reply goes much further than this, and states in effect that the bill of sale, which is absolute on its face, was in fact a mere bailment of the property for a temporary purpose, and it was pleaded that the parties had thus limited the effect of the bill of sale by a contemporary oral agreement. To our minds it is entirely clear that this

cannot be done: *Martin v. Hamlin*, 18 Mich. 354; *Adams v. Wilson*, 12 Metc. 138; *Barker v. Buel*, 5 Cush. 519; *Peck v. Armstrong*, 38 Barb. 215; *Forbes v. Waller*, 25 N. Y. 430; *Hurd v. Gallaher*, 14 Iowa, 394; *Isett v. Lucas*, 17 Id. 503; *Gelpeke v. Blake*, 19 Id. 263; *Atherton v. Dearmon*, 33 Id. 353.

The appellee insists that the bill of sale, although absolute on its face, is in fact a mortgage, and that it was given for a temporary purpose which has been subserved, and that these matters can be established by parol. Conceding this may be done, it was not pleaded that the bill of sale was a mortgage. That a writing should be read and construed in the light of the surrounding circumstances is undoubtedly true: *Singer Sewing Machine Co. v. Holcomb*, 40 Iowa, 33; but no words having a different meaning from those used can be added thereto. Under the pleadings the instrument in question must be regarded as a bill of sale. The reply recognizes it to be such, and no words can be interpolated therein which have the effect to change or alter the meaning of the words there used.

III. The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this action were rendered by him as matters of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward, by one as against the other." The Court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover unless, after such services were rendered, and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same. In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service." We understand this instruction to mean that where one person ren-

ders services for another gratuitously, and with no expectation of being paid therefor, a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our opinion this is not the law. If the services are gratuitous, no obligation, either moral or legal, is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay, and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which, because of the lapse of time or for other reasons cannot be enforced, the moral obligation is sufficient to support a subsequent promise, will be conceded.

These cases are distinguishable, because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a moral obligation to pay anything, in the case contemplated in the instructions, prior to the promise. The following cases support the view above expressed: *Cook v. Bradley*, 7 Conn. 57; *Williams v. Hathaway*, 19 Pick. 387; *Dawson v. Dawson*, 12 Iowa, 512; *McCarty v. Hampton Building Ass'n*, 61 Id. 287.

IV. The defendant asked the Court to instruct the jury that if they found that the plaintiff gave the bill of sale to secure an actual or nominal indebtedness, it will be presumed that a settlement was made between them as of that date, and that all their mutual claims were merged therein. This instruction was asked on the theory claimed by the plaintiff that the bill of sale was a mortgage given to secure the payment of money. The execution of a promissory note raises a presumption that all matters between the parties up to that date have been settled: *Grimmel v. Warner*, 21 Iowa, 11. The execution of a mortgage to secure an indebtedness must, it seems to us, have

the same effect. The instruction asked should have been given.

V. The plaintiff introduced as witnesses three practising attorneys, for the purpose of establishing the value of his services. Hypothetical questions were asked them, to which the objection was made that they were immaterial and incompetent, and that the witnesses did not show sufficient knowledge of the case to enable them to answer, and that the questions did not conform to the facts proved. We think the evidence was material and competent, and that the witnesses were qualified. In the main the hypothetical case put in the questions was in accord with the evidence, or with what it tended to prove, unless, possibly, the amount in controversy in some of the cases was not stated with entire accuracy. It is now urged that the witnesses were asked to state the value of the services based upon the fact that the suits were successfully gained or defended, and that one of the actions was stated to be on a new sewing-machine bond, and the number of pages contained in a petition for rehearing made in this Court. It is sufficient to say that no such objections as these were made in the District Court, and therefore they cannot be urged for the first time here.

It is insisted that the Court erred in other respects, but some of the objections are not well taken; others are not of a vital character. We deem it unnecessary to take the time to more particularly refer to them.

Reversed.

The promise to do what one is legally obliged to do is not a consideration sufficient to sustain a promise.

JENNINGS v. CHASE.

Supreme Judicial Court of Massachusetts, 1865.

10 Allen, 526.

CHAPMAN, J. The legal principles which govern this case are well settled. If the creditor agrees with the principal debtor

to extend the time of payment, without the knowledge and consent of the surety, the effect of such agreement is to discharge the surety. But it must be a valid agreement, such as can be enforced either at law or in equity. Of course, it must be made upon a good consideration, or be under seal: *Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 Id. 129; *Greely v. Dow*, 2 Met. 176; *Gifford v. Allen*, 3 Id. 255; *Abbott v. Tucker*, 4 Allen, 72; *Potter v. Green*, 6 Id. 442. The same doctrine is held in New York: *Reynolds v. Ward*, 5 Wend. 501; *Gahn v. Niemcewicz*, 11 Id. 312; *Hall v. Constant*, 2 Hall R. (N. Y.) 185. The decision of this Court in *Oxford Bank v. Lewis* and *Blackstone Bank v. Hill*, in which it was held that the payment of interest in advance upon an overdue note did not discharge the surety, there being no agreement by the creditor to extend the credit for any definite time, was followed in Maine, in *Freeman's Bank v. Rollins*, 13 Maine, 202. But in the subsequent case of *Lime Rock Bank v. Mallett*, 34 Maine, 547, and 42 Id. 349, it was held that the payment of interest in advance upon an overdue note is a valid consideration for an express agreement to extend the time for payment of the principal, though it is not of itself evidence of such an agreement. In *Chute v. Pattee*, 37 Maine, 102, it was held that an agreement to pay interest for a specified time after the note became due was a sufficient consideration for a promise to forbear. In New Hampshire, the payment of interest in advance for a definite time is held to be a valid consideration: *Crosby v. Wyatt*, 10 N. H. 318.

The true principle which must govern all cases of this sort must be, that in order to constitute a valid consideration the promise of the debtor must be to do something which he is not already bound by his note or contract to do, or the act done by him must be something that he was not thus bound to do. Upon this principle, the payment of a part of the debt after it has become due, or a promise to pay a part of it at some future time, is not a valuable consideration: *Chit. Con.* (7th Amer. ed.) 51.

In the present case the payment was not on the note in suit, but on another note of the plaintiff against Searle, to which the defendants were not parties; and the promise of Searle was to

make payments monthly on other notes to which the defendants were not parties. But the payment was an act which Searle was already bound to do, and the promise to pay was no more than he had already promised in the notes to which the promise applied, for all the notes were overdue. As to each of them there was no valuable consideration for the plaintiff's promise to forbear, and it could not be enforced by Searle either at law or in equity; therefore the indorsers were not discharged.

Exceptions overruled.

Harriman v. Harriman, 12 Gray, 341.

A promise to do an impossible thing is not a consideration sufficient to sustain a promise.

BEEBE v. JOHNSON.

Supreme Court of New York, 1838.

19 Wendell, 500.

NELSON, C. J. It is supposed by the counsel for the defendant that a legal impossibility prevented the fulfilment of the covenant to perfect the patent right in England, so as to secure the monopoly of the Canadas to the plaintiff, and hence that the obligation was dispensed with, so that no action can be maintained. There are authorities which go that length: Co. Litt. 206, b.; Shep. Touch. 164; 2 Co. Litt. 26; Platt on Cov. 569; but if the covenant be within the range of the possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld: as where one covenants it shall rain to-morrow, or that the Pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear *that the thing to be done cannot by any means be accomplished*; for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible: 3 Comyn's Dig. 93; 1 Roll. Abr. 419. Now it is clear that the fulfilment in this case cannot be considered an impossibility within the

above exposition of the rule ; because, for any thing we know to the contrary, the exclusive right to make, use, and vend the machine in the Canadas might have been secured in England by Act of Parliament or otherwise ; at least, there is nothing in all this necessarily impossible. These provinces are a part of the British Empire, and subject to the power of the Parliament at home ; which body might very well grant the privilege the defendant covenanted to procure. Certainly we are unable to say the government cannot or would not *by any means* grant it. There is, then, nothing in the case to take it out of the rule in *Paradine v. Jane*, Aleyn, 27, as expounded by CHAMBERS, J., in *Beall v. Thompson*, 3 Bos. & Pull. 420, namely, if a party enter into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay damages ; his liability arising from his own direct and positive undertaking : 6 T. R. 750 ; 8 Id. 267, LAWRENCE, J. ; 10 East, 533 ; 4 Carr. & Payne, 295 ; 1 Selw. 344.

It has also been said that the action cannot be maintained, as the covenant contemplated the violation of the laws of England. We are unable to perceive the force of this objection, as the fulfilment of the covenant necessarily required the procurement of lawful authority to make and vend the machine in the Canadas. It is difficult to understand how this could be accomplished by other than lawful means. That it might be by such, we have already considered not impossible.

Again, it was said the contract was void, because it contemplated a renunciation of citizenship by the defendant. Whether, if the fact was admitted, the consequence would follow we need not stop to consider, because it is very clear that no such step is necessarily embraced in the covenant. For aught we know, the patent might be procured without such renunciation ; and if it were considered unlawful to contract for expatriation, inasmuch as this agreement does not necessarily contemplate it, we would be bound to hold that the defendant assumed to procure the patent without it. But even in England, the common law rule against the expatriation of the subject is so far modified that naturalization abroad for

commercial purposes is recognized, and is of course lawful: 1 Comyn, 677; 8 T. R. 31; 1 Bos. & Pul. 430, 440, 444; 2 Kent's Comm. 49; 1 Peter's C. C. R. 159. In the case of *Wilson v. Marryat*, 8 T. R. 31, and 1 Bos. & Pull. 430, it was decided that Collet, a natural-born subject of Great Britain, having become a citizen of the United States, according to our laws, was entitled to all the advantages of an American citizen under the treaty of 1794. There the defendant undertook to avoid a policy of insurance procured by the plaintiff for the benefit of Collet upon an American ship and cargo, of which he was master, on the ground that he was a British subject, and therefore the trade in which he was engaged illegal; being in violation of the privileges of the East India Company, which trade was secured to American citizens by the treaty of 1794.

New trial denied.

Stees v. Leonard, 20 Minn. 494; *Clifford v. Watts*, L. R., 5 C. P. 588; *The Harriman*, 9 Wall. 172.

The abandonment of any legal or equitable right, or the forbearance to exercise it, and the compromise of a disputed claim, have each been held a sufficient consideration to support a promise: *Leverenz v. Hains*, 32 Ill. 357; *Calkins v. Chandler*, 36 Mich. 320; *Feeter v. Weber*, 78 N. Y. 334; *White v. Hoyt*, 73 Id. 505.

Where one voluntarily does for another that which the other was *legally* bound to do for himself, a subsequent promise of recompense by the party thus benefited will be equivalent to a previous request.

GLEASON v. DYKE.

Supreme Judicial Court of Massachusetts, 1839.

22 Pick. 390.

WILDE, J. There was no express proof that the note to the Massachusetts Hospital Life Insurance Company was paid at the request of the defendant; but the plaintiff relied on the promise of the defendant to pay him, made subsequently to

the discharge of the mortgage. This promise, we think, is equivalent to a previous request. It comes within the well-established principle that the subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority. The law, it is true, will not allow a party to maintain an action for money paid to discharge the debt of another without his consent; for to allow this would subject every debtor to the power of those who might be disposed to injure him, and who might harass him with suits and burden him with costs in the most unreasonable and oppressive manner. But if the debtor assents to the payment, the reason of the law fails; and whether the consent be given before or after the payment is, as it seems to us, immaterial: *Yelv. (Metcalf's ed.) 42, note*. We have no doubt, therefore, that the defendant's promise is valid: first, because his ratification of the payment is equivalent to a previous request to pay, and the objection that the consideration was past cannot be maintained; and, secondly, because the case shows an equitable consideration which is sufficient to sustain an express promise. Where a man is under a moral obligation to pay a debt which cannot be enforced by a Court of law or equity, yet if he promises to pay he will be bound: as where a man promises to pay a just debt, the recovery of which is barred by the Statute of Limitations; or if a minor contracts a debt, but not for necessities, and after he comes of age promises to pay it; or if a debtor promises the assignee of a chose in action to pay him. In all such cases and many others, the party will be bound by his promise, although before the promise the other party had no remedy either in law or equity: *Hawkes v. Saunders, Cowper, 290*.

There is another ground on which this action might be maintained if there had been no express promise. The payment of the mortgage debt by the plaintiff was not merely voluntary. He was bound to pay the debt in order to secure his equitable interest in the estate. He was placed in this situation by the neglect of the defendant to pay the debt due to his creditor, who levied his execution on the equity of redemption. Under these circumstances, no previous request to pay the debt, or

subsequent ratification by the defendant, was required: *Child v. Morley*, 8 T. R. 610.

It was contended by the defendant's counsel at the trial that the operation of the payment of the mortgage was sufficient, under the circumstances, to constitute the plaintiff the assignee thereof and to convey to him all the right of the original mortgagee. This right, we think, is sustained by the Revised Statutes, c. 73, §§ 34, 35. But it by no means follows that the plaintiff has not a double remedy, as the mortgagee had. If the payment operated as an equitable assignment of the mortgage, it would have the same operation as to the note. If the plaintiff had a right to hold the mortgaged estate until the defendant paid the debt, then most clearly the defendant's promise is binding and obligatory, although the plaintiff had another security.

Default entered.

Daly v. Wilson, 14 John. 378-82.

Abstaining from the use of tobacco and intoxicating liquors for a certain period of time is a sufficient consideration to sustain a promise to pay a specified sum of money.

TALBOTT v. STEMMONS, Ex.

Supreme Court of Kentucky, 1889.

89 Ky. 222.

PRYOR, J. This case comes from the Superior Court by an appeal.

Mrs. Sallie D. Stemmons, the step-grandmother of the plaintiff, Albert R. Talbott, made with the latter the following agreement:—

“APRIL 26, 1880.

“I do promise and bind myself to give my grandson, Albert R. Talbott, five hundred dollars at my death if he will never take another chew of tobacco or smoke another cigar during

my life, from this date up to my death ; and if he breaks this pledge, he is to refund double the amount to his mother.

“Signed

ALBERT R. TALBOTT,

“SALLIE D. STEMMONS.”

The grandmother died, and this action was instituted by the grandson against her personal representative to recover the five hundred dollars, the plaintiff alleging that from the date of the agreement to the filing of this action by him he had not smoked a cigar or taken a chew of tobacco, etc.

A general demurrer was filed to the petition that was sustained by the Court below, and the action dismissed. It is insisted by counsel for the personal representative that the agreement by the grandmother to pay the five hundred dollars is not based on a sufficient consideration, either good or valuable, and, being a mere gratuitous undertaking, cannot be enforced.

There is nothing in such an agreement inconsistent with public policy or any act required to be done by the plaintiff in violation of law ; but, on the contrary, the step-grandmother was desirous of inducing the grandson to abstain from a habit the indulgence of which, she believed, created a useless expense and would likely, if persisted in, be attended with pernicious results. An agreement or promise to reform her grandson in this particular was not repugnant to law or good morals, nor was the use of what the latter deemed a luxury or enjoyment a violation of either, and so there was nothing in the law preventing the parties from making a valid contract in reference to the subject-matter.

In the classification of contracts by the elementary writers it is said : “An agreement by the one party to give, in consideration of something to be done or forborne by the other party, or the agreement by one to do or forbear in consideration of something to be given by the other, are such contracts, when not in violation of law, as will be held valid.” Whether the act of forbearance or the act done by the party claiming the money was or not of benefit to him is a question that does not arise in the case. If he has complied with his contract, although its performance may have proved otherwise beneficial, the per-

formance on his part was a sufficient consideration for the promise to pay.

The right to enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health; nevertheless, the surrender of that right caused the promise; and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise.

Mr. Parsons, in his work on Contracts, says: "The subject-matter of every contract is something which is to be done or which is to be omitted," and where the consideration is valuable, need not be adequate. (Vol. 1, 7th ed., *489.) If, therefore, one parts with that he has the right to use and enjoy, the question of injury or benefit to the party seeking a recovery, by reason of a full performance on his part, will not be inquired into, because if he had the legal right to use that which he has ceased to use by reason of the promise, the law attaches a pecuniary value to it.

If this was an action to recover such damages as the party had sustained by reason of the violation of the covenant or promise, the verdict or judgment would doubtless be nominal only; but where the parties have agreed on the amount to be paid on the performance of certain conditions, when a compliance with those conditions has been alleged and shown the sum agreed on must be paid. Whether or not the mother of the young man could recover the penalty imposed on his failure to comply with his undertaking, is not necessary to be decided. It is sufficient to say that the abandonment of the use of tobacco was such a consideration as authorized a recovery of the sum agreed on.

The judgment of the Circuit Court is reversed, and the cause remanded with directions to overrule the demurrer, and for proceedings consistent with this opinion.

Hammer v. Sidway, 124 N. Y. 534; s. c. 27 N. E. R. 256. See, also, 12 S. W. R. 297.

ILLEGAL CONSIDERATION.

'The consideration sufficient to sustain an agreement must not be in restraint of trade, against public policy, contrary to good morals, nor in any way illegal.

BISHOP *v.* PALMER.

Supreme Judicial Court of Massachusetts, 1888.

146 Mass. 469.

ALLEN, C. J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and of his faithful performance of the covenants and agreements contained in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties.

It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so; it being a general agreement, without any limitation of space, that for and during the period of five years he will not either directly or indirectly continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. Thus much is virtually conceded by the plaintiff, and so are the authorities: *Taylor v. Blanchard*, 13 Allen, 370; *Dean v. Emerson*, 102 Mass. 480; *Morse Twist Drill Co. v. Morse*, 103 Id. 73; *Alger v. Thacher*, 19 Pick. 51; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall.

64; *Davies v. Davies*, 36 Ch. D. 359; 2 Kent Com. 466, note *e*. Met. Con. 232.

Two principal grounds on which such contracts are held to be void are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly: *Alger v. Thacher*, *ubi supra*.

The question then arises, whether an action can be supported upon the promise of the defendants, founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails: *Robinson v. Green*, 3 Met. 159, 161; *Rand v. Mather*, 11 Cush. 1; *Woodruff v. Wentworth*, 133 Mass. 309, 314; *Bliss v. Negus*, 8 Id. 46, 51; *Clark v. Ricker*, 14 N. H. 44; *Woodruff v. Hinman*, 11 Vt. 592; *Pickering v. Ilfracombe Railway*, L. R. 3 C. P. 235, 250; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; 2 Chit. Con. (11th Am. ed.) 972; *Leake*, Con. 779, 780; *Pollock* Con. 321; Met. Con. 247.

It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing *malum in se*, and which is simply a promise not enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal: 2 Kent Com. 466; Met. Con. 221; 2 Chit. Con. 974; *White v. Buss*, 3 Cush. 448, 450; *Hynds v. Hays*, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew or were bound to know was legally null; that they have all that they supposed they were getting, namely, a promise which

might be kept, though incapable of legal enforcement; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their promise. But this argument cannot properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be where it was simply invalid; as in *Parish v. Stone*, 14 Pick. 198. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed.

The fact that the plaintiff had not failed to perform his part of the contract does not enable him to maintain his action. An illegal consideration may be actual and substantial and valuable; but it is not in law sufficient.

The plaintiff further suggests that, if the defendants were to sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except possibly the single covenant in question: *Mallan v. May*, 11 M. & W. 653; *Green v. Price*, 13 M. & W. 695; s. c. 16 M. & W. 346. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call on him to perform all of his agreements except such as are unlawful. In such case, they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground; and, having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff, by reason of what they may have received under the contract.

Judgment affirmed.

Hatch v. Mann, 15 Wendell, 45; *Marshall v. The R. R. Co.*, 16 Howard, 314; *Hartley v. Rice*, 10 East, 22.

FAILURE OF CONSIDERATION.

Where the consideration wholly fails the agreement is a *nudum pactum*.

RICE v. GODDARD.

Supreme Judicial Court of Massachusetts, 1833.

14 Pick. 293.

PER CURIAM. This action is brought on a promissory note, for the benefit of an assignee, but it is subject to the same defence as if prosecuted for the benefit of the promisee. The note was given in consideration of the conveyance of land by deed with the usual covenants of seisin and warranty. The title to the land failed entirely; and the question is, whether that want of title is an entire want of consideration for the note, so as to render it *nudum pactum*, or whether the covenants were of themselves a sufficient consideration to support the promise. It was decided by the Court in Maine, in *Lloyd v. Jewell*, 1 Greenl. 360, that the covenants were a sufficient consideration. The decisions of that Court are entitled to great respect; the opinion, however, in the case cited was grounded on what was considered to be the settled law of Massachusetts; but though there have been dictums: *Fowler v. Shearer*, 7 Mass. R. 19; *Phelps v. Decker*, 10 Id. 279; there has been no decision in this State to that effect, and so the foundation of the opinion fails. The same object has been before the Courts of other States, and the decisions have uniformly been that a total failure of title is a total failure of the consideration: *Frisbee v. Hoffnagle*, 11 John. R. 50; *M'Allister v. Reab*, 4 Wendell, 483; *Steinhauer v. Witman*, 1 Serg. & Rawle, 447; *Gray v. Handkinson*, 1 Bay, 278; *Bell v. Huggins*, 1 Id. 327; *Chandler v. Marsh*, 3 Vermont R. 162; *Tillotson v. Grapes*, 4 N. Hamp. R. 448. The promise is not made for a promise, but for the land; the moving cause is the estate; and if that fails to pass, the promise is a mere *nudum pactum*. It was objected

that the rule of damage in an action on the covenant would be different from the consideration of the promise ; but in the case of a total failure of title, the amount of damages would be the same ; and it is just that a party should be allowed to show a total failure in an action on the promise, instead of being compelled to seek his remedy on the covenants. [See Dickinson *v.* Hall, *ante*, p. 217.]

Plaintiff nonsuit.

As to personalty, see Thompson *v.* Wheeler and Mason M'f'g Co., 29 Kan. 340.

Partial failure will also avoid the promise partially : Stevens *v.* Johnson, 28 Minn. 172 ; Harrington *v.* Stratton, 22 Pick. 510 ; Torinus *v.* Buckham, 29 Minn. 128.

As to want of consideration, see Pierson *v.* Pierson, 7 John. 26 ; Kant's Appeal, 36 Conn. 88.

ORAL OR WRITTEN.

All contracts may be valid, though oral, except those which the law requires to be reduced to writing.

The laws of the various States must be consulted to ascertain what contracts made within them, respectively, should be written, in order that they may be enforceable at law.

The most important contracts which must be in writing are enumerated in the Statute of Frauds, and the following cases have been selected because of their general application where that statute prevails.

STATUTE OF FRAUDS.

I.

The Statute of Frauds does not apply to *executed contracts*.

STONE v. DENNISON.

Supreme Judicial Court of Massachusetts, 1832.

13 Pick. 1.

SHAW, C. J. By the report it appears that after the plaintiff arrived at the age of fourteen years, having then lived several years with the defendant, it was agreed between the plaintiff and his guardian on the one side, and the defendant on the other, that the plaintiff should continue in the service of the defendant until he should arrive at the age of twenty-one, for his board, clothing, and education. By the finding of the jury, under the instructions given to them by the Court, it must be taken to have been settled that the contract was not obtained by any unfair means, or fraudulent, on the part of the defend-

ant, and that it was not unequal, so as to show that the plaintiff was overreached.

The case, then, is one of a minor over fourteen years of age, entering into an agreement with a person, for labor and service to be furnished on one side, and subsistence, clothing, and education on the other, an agreement in which the minor was not overreached, which was not so unreasonable as to raise any suspicion of fraud, and which was assented to and sanctioned by the guardian of the minor. This agreement is fully executed on both sides; the labor and services are performed by the minor, and the stipulated compensation is furnished by his employer. And the question is, whether the plaintiff, notwithstanding such agreement, can maintain a *quantum meruit* for his services, merely by showing that in the event which has happened, his services were worth more than the amount of the stipulated compensation; and we think he cannot.

The first point taken by the plaintiff is that the evidence of the agreement ought not to have been admitted, because the agreement, not being to be performed within a year, and not being in writing, was void by the Statute of Frauds: St. 1788, c. 16, § 1.

But we think this objection is answered by the consideration that here the contract has been completely performed on both sides. The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover upon a *quantum meruit*, as upon an implied promise. But the statute does not make such a contract void. The provision is, that no action shall be brought whereby to charge any person upon any agreement, which is not to be performed within the space of one year, unless the agreement shall be in writing. The statute prescribes the species of evidence necessary to enforce the execution of such a contract. But where the contract has been in fact performed, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute.

In the case of *Boydell v. Drummond*, 11 East, 142, a case was put in the argument, of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months.

There, as a part of the contract was the payment of the price, which was not to be performed within the year, a question is made, whether by force of the statute the purchaser is exempted from the obligation of the agreement, as to the stipulated price, so as to leave it open to the jury to give the value of the goods only, as upon an implied contract. "In that case," said LORD ELLENBOROUGH, "the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part; and the question of consideration only would be reserved to a future period."

If a performance upon one side would avoid the operation of the statute, *à fortiori* would the entire and complete performance on both sides have that effect? Take the common case of a laborer, entering into a contract with his employer, towards the close of a year, for another year's service, upon certain stipulated terms. Should either party refuse to perform, the statute would prevent either party from bringing any action whereby to charge the other upon such contract. But it would be a very different question were the contract fulfilled upon both sides, by the performance of the services on the one part, and the payment of money on account, from time to time, on the other, equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a *quantum meruit* and recover more, or in case of the fall of labor and the diminished value of the services, could the employer bring money had and received and recover back part of the money advanced, on the ground that by the Statute of Frauds the original contract could not have been enforced? Such, we think, is not the true construction of the statute. We are of opinion that it has no application to executed contracts, and that the evidence of this contract was rightly admitted.

We do not think it necessary, in the present case, to consider some of the points made in the argument, as to the cases in which the Judge of probate has the power, under the statute, to appoint guardians to minors, and as to the authority of such guardians over the persons, property, and rights of their wards, because we are all clearly of opinion that the contract in ques-

tion was one which the minor, with the consent of the guardian, was himself competent to make.

It is a well-settled rule of law, that a minor, under the age of twenty-one years, cannot bind himself generally by his contracts, for want of legal capacity. But as an exception to this general rule, it is equally well settled that a minor may bind himself by a contract for necessities, if equal and reasonable, and also that he may make contracts which are beneficial to him. We think the present case brings the contract under the first of these exceptions.

A contract for subsistence, clothing, and education is a contract for necessities, and is one, therefore, which the minor has capacity to make, and which, if reasonable and beneficial, will be supported by the law. Most of the cases where it has been decided that a minor cannot be held on his express contract for necessities are those where the action is founded on the express obligation, and where, from the form of the action, the consideration cannot be inquired into. As an action on a bond with a penalty, which implies a consideration, and where an inquiry into the consideration is precluded by the forms of pleading and proof. So on an *insimul computassent*, where the action is founded upon the act of accounting and the admission of the balance, and no further inquiry into the consideration and terms of the contract can be gone into. These actions are founded on the assumption that the party has full power to bind himself by any lawful contract, and they only open the question whether he has so bound himself. But in the other forms of obligation and of action, and where it can always be open to inquiry, what the nature and terms of the contract were, and whether the contract was reasonable and beneficial, a minor may as well be bound by an express, as by an implied contract for necessities. This is often beneficial to the minor, and enables him to avail himself of any stipulations in his favor. If such an express contract should be held to be wholly void, and the party furnishing the minor with necessities should be remitted to his action on the implied contract, he would recover upon a *quantum valebant* or *quantum meruit*, though above the stipulated prices. The rule as above

qualified, that a minor shall only be bound by such a species of express contract, and in such a form of action as leaves the nature, terms, and consideration of the contract open to inquiry, and then only by such a contract as shall appear at the time to have been fair, reasonable, and beneficial to the minor, affords a sufficient security to the rights of minors.

And it appears to the Court, taking into consideration the age of the minor when the contract was made, and the circumstances attending it, that it was reasonable and beneficial. It is to be considered that the employer took upon himself the risk of the health, life, and bodily and mental capacity of the plaintiff to labor. Had he been sick or otherwise incapable of performing any labor, the defendant was, nevertheless, by the terms of his contract, bound to support him. These considerations may have rendered the contract equal and beneficial at the time, although in the event, which could not then be foreseen, the plaintiff's labor may have been of greater value than the subsistence and education which he obtained as an equivalent. The circumstance, also, that the contract was made with the consent and approbation of the guardian, evinced by his becoming a party to it, goes strongly to show that the contract was entered into deliberately and with a just regard to the rights and security of the minor. And it would be injurious rather than beneficial to minors, to hold that a contract thus made is of no legal force and effect.

We think the instructions of the Court were correct, and there must be judgment on the verdict.

Smith on Contracts, §§ 74, 151 ; McCue v. Smith, 9 Minn. 252.

II.

PARTLY EXECUTED.

Though no action can be maintained on an oral contract within the statute, yet so far as it has been *executed* it will control the rights of the parties as to what they have done under it.

LA DU-KING MFG. Co. v. LA DU.

Supreme Court of Minnesota, 1887.

36 Minn. 473.

VANDEBURGH, J. The plaintiff seeks to recover a balance alleged to have been retained by defendant, who was treasurer of the company, and which he refused to pay over upon its demand. The defendant claims to be entitled to the same as remuneration for services rendered the company, and due him as upon a *quantum meruit*. Touching this issue, the referee finds that the defendant owned a majority of the stock at the time of the organization of the company, and that he was employed by the plaintiff to act as secretary and treasurer, and, as to the terms of such employment, "it was verbally agreed between the parties that defendant should have and receive for his services one hundred dollars for each one per cent. of profits actually made and realized upon the capital stock of \$40,000, for and during the five years next after its organization." It also appears that he continued in the employment of plaintiff, and rendered services as such officer, for upwards of two years, when he retired from such employment on account of ill health. The referee further finds that no profits have yet been made or realized by plaintiff upon its capital stock, and that the defendant is not entitled, under such contract, to any pay for his services for plaintiff thereunder. It thus appears that the parol contract of service was an entire one for the term of five years, and it could, therefore, while executory, be enforced by

neither party against the other. The defendant could not recover for his services under or by virtue of the contract, and on the other hand the plaintiff could not avail itself of the defendant's obligation to perform it: Browne, St. Frauds, § 131; *King v. Welcome*, 5 Gray, 41.

But the contention of the plaintiff is that the contract must, under the finding of the referee, be treated as having been fully executed up to the time that defendant left the plaintiff's service, and hence taken out of the Statute of Frauds. Such parol contracts are not unlawful or void in the strict sense of the term. They are simply not actionable or enforceable in the Courts. But where the parties themselves voluntarily go on and execute such contracts, they neither require nor are entitled to any remedy by action: Browne, § 116. The law will not raise an implied promise as against a party who has performed an express one. In such cases evidences of the special contract may be given to show that the plaintiff is not entitled to recover upon a *quantum meruit* as upon an implied promise: *Stone v. Dennison*, 13 Pick. 1, 23 Am. Dec. 654. Our statute, following the English statute on the subject, simply provides that no action shall be *maintained* upon such parol contracts. There is, however, no reason why they may not, for other purposes, be respected as defining and measuring the rights of the parties thereto; so that, if it be true that the contract in question was executed *pro tanto* on both sides, the defendant must rest satisfied to abide by its provisions. On this point there is substantially no conflict of authority.

The defendant, it is claimed, has fully enjoyed the privileges and opportunities contemplated by the parties—to secure a definite share of the profits of the enterprise, which, under the contract, was to be the measure of his compensation—and the plaintiff is not in default. But the defendant insists that, while there may not have been any profits actually realized during the time of his employment, yet there may be future profits during the remainder of the term resulting from the business after it is fully established and in successful operation, to a share of which he would be entitled under the terms of the agreement as found. And we are unable to see why this position is not correct. The referee finds that he was to have a

percentage of the profits realized for and during the five years next after its organization, and that no profits have yet been made. Of course, if the enterprise was a practical failure, and the affairs of the corporation must necessarily be wound up without any profits, the matter could then be definitely adjusted, and it would appear that nothing further remained for the defendant under the agreement, and he would be compelled to abide by its terms. But, as there is no finding upon these questions, the matter is necessarily left open, and we are required to further consider the case as left by the findings of the referee. Could the defendant maintain an action for a *quantum meruit*, upon the case as presented, the plaintiff not being in default, but ready and willing to abide by the contract as made?

In *King v. Welcome*, 5 Gray, 41, the plaintiff rendered service for the defendant under a special parol contract for a term longer than one year, but left the service before the year expired. The defendant insisted upon a fulfilment of the contract, but it was held that the plaintiff might recover for the value of his services, irrespective of the contract, which was not available as a defence under the Statute of Frauds. Substantially the same rule was adopted in *Shute v. Dorr*, 5 Wend. 204, and in *Comes v. Lamson*, 16 Conn. 246. This strict rule is, however, regarded as harsh and inequitable by other Courts and by text-writers, who find it difficult to be reconciled in principle with the doctrine generally recognized in the case of parol contracts to sell land, that money paid by the purchaser cannot be recovered if the vendor stands ready to fulfil the contract on his part: *Coughlin v. Knowles*, 7 Met. 57, 39 Am. Dec. 759; *Collier v. Coates*, 17 Barb. 471; *Abbott v. Draper*, 4 Denio, 51; *Browne*, St. Frauds (4th ed.), § 122a; see 1 Smith, Lead. Cas. (8th ed.) 632; 2 Chit. Cont. (11th ed.) 852, and notes; 2 Wait, Law & Pr. (5th ed.) 390. The principle that the right to recover in such cases depends upon the question of the defendant's default was recognized by this Court in *Johnson v. Krassin*, 25 Minn. 117, and *Sennett v. Shehan*, 27 Id. 328, 7 N. W. Rep. 266. And the doctrine is nowhere denied: *Collier v. Coates*, *supra*.

In *Galvin v. Prentice*, 45 N. Y. 162, the Court lay down the

broad rule that where services are rendered under an agreement within the Statute of Frauds because not evidenced by writing, no action can be maintained to recover their value except upon the default of the other party, or his refusal to go on with the contract. The contract was not illegal, and it was still in force, though no action could be maintained on it. One party cannot, therefore, declare it rescinded at his will, without cause, and proceed as upon an *implied assumpsit* against the other party to it, while he stands ready to fulfil it according to its terms: *Abbott v. Inskip*, 29 Ohio St. 59; *Erben v. Lorillard*, 19 N. Y. 299, 804; *Britain v. Rossiter*, 11 Q. B. Div. 123; *Van Valkenburg v. Croffut*, 15 Hun, 147, 152; *Whiting v. Sullivan*, 7 Mass. 107.

The objection suggested to the adoption of the rule is that urged very pointedly in *King v. Welcome*, *supra*; viz., that it enables the defendant practically to enforce or avail himself of the express contract, in violation of the spirit, if not the letter, of the statute, to defeat plaintiff's action upon implied contract. But, as before suggested, where is the distinction in principle between *Galvin v. Prentice* and *Abbott v. Draper*, *supra*, the doctrine of the latter case (in relation to parol land contracts) being universally recognized? *Collier v. Coates*, *supra*; *Browne*, St. Frauds, § 122*a*.

We do not deem it necessary in this case to determine between the rule laid down in *King v. Welcome* and *Galvin v. Prentice*, or whether the rule would have been different if defendant had left plaintiff's service without cause. It is found that defendant left plaintiff's service for good cause, on account of sickness. In such case the servant is entitled to his *pro rata* wages, or the value of his services, not exceeding the compensation fixed by the agreement under which the service was rendered: *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; 2 Chit. Cont. 851; *Wolfe v. Howes*, 20 N. Y. 197, 203, 75 Am. Dec. 388; *Clark v. Terry*, 25 Conn. 395; *Ryan v. Dayton*, Id. 188, 65 Am. Dec. 560; *Philbrook v. Belknap*, 6 Vt. 383; *Seymour v. Cagger*, 13 Hun, 32; *Fuller v. Brown*, 11 Met. 440.

In *Clark v. Terry*, the earlier case of *Comes v. Lampson*, *supra*, was explained and greatly limited, and the Court say: "In respect to the question whether wages have been earned

which ought to be paid, and if so to what extent or amount, and when the payment ought to be made, it appears to us that all the circumstances under which they are claimed to have been earned, including the contract under which the service was performed, although it may be one that cannot be enforced by any action directly upon it, may and ought to be considered."

This rule we think applicable in the case at bar. There are some exceptions to it, but they are not important to be here considered. The principle upon which a recovery is permitted in such cases is that the employer shall do what his duty or justice requires, and this cannot be fully discovered upon any other theory than above suggested. The referee ruled correctly that in this case the defendant's compensation must be limited by the contract; and, as no profits were found to have been yet realized, it did not appear that he was entitled to any counterclaim against the money of plaintiff in his hands. Plaintiff is therefore entitled to judgment for the amount claimed, and the defendant is remitted to his remedy by action for any proportion of the earnings or profits of the company he may eventually be found entitled to: *Clark v. Gilbert, supra*.

Order affirmed. .

Kruger v. Leppel, 42 Minn. 6; *Philbook v. Belknap*, 6 Vt. 383; *Galvin v. Prentice*, 45 N. Y. 162; *Swanzey v. Moore*, 22 Ill. 63; *Lockwood v. Barnes*, 3 Hill, 128. See, also, *Rogers v. Stevenson*, 19 Minn. 68; 118 Mass. 334. Contra, *King v. Welcome*, 5 Gray, 41.

III.

PAROL MODIFICATION.

A parol modification of a written contract within the statute cannot be shown.

BROWN *v.* SANBORN.

Supreme Court of Minnesota, 1875.

21 Minn. 402.

BERRY, J. Defendant, in writing, agreed to purchase of plaintiff, at five dollars per ton, the flax straw to be raised from forty-five bushels of flax-seed, "the straw to be delivered in a dry condition, and to be free from grass, weeds, and all foreign substances." It appearing that there were from twenty to fifty tons of the straw, the agreement was within the seventh section of our Statute of Frauds, ch. 41, Gen. Stat., since it was a "contract for the sale of . . . goods, chattels, or things in action, for the price of fifty dollars, or more." It was essentially a contract for the straw, and not, as contended by plaintiff, for labor or skill in producing the straw: Browne on Stat. of Frauds, §§ 308, 312; Benjamin on Sales, 2d ed. 99; Watts *v.* Friend, 10 B. & C. 446; Evans *v.* Roberts, 5 B. & C. 829; Sainsbury *v.* Matthews, 4 M. & W. 343; Jones *v.* Flint, 10 Ad. & El. 753; 1 Chit. Cont. (11th Am. ed.) 417. No part of the purchase-money having been paid, nor any part of the straw accepted and received by the defendant, the contract was, by the terms of the statute cited, void, unless a note or memorandum thereof was made in writing, and subscribed by the party to be charged therewith.

The plaintiff claimed that subsequently to the making of the contract above mentioned, defendant, by parol, agreed to a modification of the same by waiving the provision or condition that the straw must be free from weeds, and agreeing to receive the same under the contract, notwithstanding its weedy condi-

tion; and he was permitted to prove the parol agreement, defendant objecting. As the effect of admitting the evidence was to allow the plaintiff to prove, by parol, a contract which, to be valid, must be in writing, its admission was erroneous, and entitled the defendant to the new trial granted by the Court below.

Order granting new trial affirmed.

MEMORANDUM.

It is not necessary that all the agreements within the statute be reduced to a formal written contract. It will be sufficient if there be a "note or memorandum thereof, expressing the consideration," and "subscribed by the party charged therewith."

SUFFICIENCY OF MEMORANDUM.

The "note or memorandum" must contain the names of the parties and all the other essential requirements of a contract.

CLAMPET *v.* BELLS.

Supreme Court of Minnesota, 1888.

39 Minn. 272.

COLLINS, J. The only question for determination in this case is the sufficiency of the writing, made a part of the answer, under the Statute of Frauds in this State (Gen. St. 1878, c. 41, § 12), as it stood before the amendment of 1887; the objection to it being that plaintiff's name does not appear in it, and that this omission cannot be supplied by parol. The writing is as follows (so far as material):—

“ EXHIBIT A.

“ MINNEAPOLIS, MINN., Oct. 14, 1886.

“ Received of A. J. Bells one hundred dollars, as earnest-money and in part payment for the purchase of the following described property, situate in Hennepin County, State of Minnesota, to wit: One (1), two (2), three (3), four (4), six (6), and seven (7), in block eighty-four (84), in Remington's 2d edition to Minneapolis, according to the plat of same now on file with recorder of deeds in and for said Hennepin County, which we have this day, as authorized agents, sold and agreed to convey to said A. J. Bells for the sum of thirty-six hundred dollars (\$3600), on terms as follows, to wit: One hundred dollars, cash in hand, receipted above, and seventeen hundred dollars within sixty days, and upon tender of satisfactory abstract of title and duly-executed warranty deed. Balance of consideration to consist of a mortgage for eighteen hundred, at 8 per cent. interest, and due in one year, to be a specific lien upon each lot. And it is agreed that if the title to said premises is not good within sixty days from date hereof, this agreement shall be void, and the above one hundred dollars refunded. But if the title to said premises is good, and not taken, the said one hundred dollars is to be forfeited. But it is agreed and understood by all parties to this agreement that said forfeiture shall in no way affect the rights of either party to enforce the specific performance of this contract.

A. J. BELLS. [Seal.]

“ POTTER & THOMPSON, Agents.

“ In presence of

“ CHAS. ROBINSON, }
“ F. N. HENDDIC, } To A. J. B.

“ F. C. BROOKS, }
“ W. N. DONALDSON, } As to Potter & Thompson.”

The Statute of Frauds in force when this paper was executed, section 12, *supra*, seems to be plain and easily comprehended. It simply requires that contracts of this character and importance, or some note or memorandum thereof, shall be in writing; that the consideration shall be expressed; and that they must be subscribed by the party by whom the sale is made, or by

his agent. But, notwithstanding this apparently unambiguous language, controversies over the sufficiency of contracts for the sale of land, or of some interest therein, are frequent, and seemingly never ending. Their essentials are the matter of much strife and litigation. The objection made to the one at bar is that the vendor's name nowhere appears in it, and, to sustain his defence, the defendant must be permitted to show by parol testimony for whom Potter & Thompson acted when making the sale and signing the exhibit. He must be allowed to make oral proof of the names of one of the alleged parties to the agreement. If the vendor's name can thus be ascertained, it follows that the vendee's may, and we see no reason why both could not be supplied in the same manner, and, for the same reason, the subject-matter of the bargain. The statute specifically prescribes a writing, an expressed consideration, and a subscribing,—an outline only of what is demanded. But it undoubtedly exacts a contract, or a note, or a memorandum of a contract, and is not complied with if there be none, although we may have an expressed consideration in writing, duly signed. To make a contract in writing, there certainly must be parties named or designated,—one who sells and who must subscribe to the agreement, as well as one who buys. There must be a subject of the sale so well described as to be known and identified. The price must be named. All of the essential requirements of a contract are indispensable. In this case we have no means of determining who was the owner who agreed to sell, except through parol proof extraneous to the instrument. So far as we are able to discover from its inspection, the plaintiff is not the vendor, nor in any degree bound by its terms; nor is any other person. It is defective in this particular, and cannot be upheld as a contract. There are many well-discussed cases in which it is plainly stated that an omission of this character may be supplied by parol testimony; but the majority of this Court are of the opinion that the better reasoning is found (in support of the position here taken) in *Grafton v. Cummings*, 99 U. S. 100; *Board of Com'rs v. Shipley*, 77 Ind. 553; *Nichols v. Johnson*, 10 Conn. 192; *Mayer v. Adrian*, 77 N. C. 83; *Lang v. Henry*, 54 N. H. 57; *Farwell v. Lowther*, 18 Ill. 252. It must be un-

derstood that the liability of an undisclosed principal upon an agreement which, on its face, is the agreement of another person, or the right of such principal to claim the benefit thereof, is not involved here. In this case, upon the face of the memorandum, no one is bound to sell or convey.

Order reversed.

Peck v. Vandemark, 99 N. Y. 29; Atwood v. Cobb, 16 Pick. 227; Jarrett v. Hunter, 34 Ch. D. 182.

The memorandum may consist of several letters, or other papers, but all the essential terms of the agreement must appear upon their face: Tice v. Freeman, 30 Minn. 389; Sanborn v. Nockin, 20 Id. 178.

The records of a corporation, expressing the terms of the contract and duly signed by the proper officer, is a sufficient "note or memorandum" thereof.

THE ARGUS CO. v. MAYOR OF ALBANY.

Court of Appeals, New York, 1874.

55 N. Y. 495.

FOLGER, J. The plaintiff seeks to recover upon an agreement which, by its terms, was not to be performed within one year from the making thereof. It can do so if the agreement, or some note or memorandum, is in writing and subscribed by the party to be charged thereby: 2 R. S. 135, § 2 [as amended, Laws of 1863, chap. 464, p. 802], sub. 1.

In this case the party to be charged, and whose subscription is needed, is the defendant, a municipal corporation. It is plain that such a defendant can make no note or memorandum, nor subscribe the same, save by an officer or agent thereof. It is so, also, that it ordinarily acts by its legislative or governing body, and that the action of that body is expressed in the minutes of its action, recorded, as it takes place, in the books kept for that purpose by its clerk or secretary. Hence it is that its agreements are rarely oral; but, *pari passu* with the making of

them, they are on the instant of formation put into writing, and thus a note or memorandum of them is made; and the minutes of the day's doings of the body, being signed by the clerk thereof, there is a subscription of the note or memorandum, made by the party, by its agent duly authorized. This is a satisfactory compliance with the statute. It meets the purpose and intention of the law, by providing an enduring and unchanging evidence of the agreement; and it meets its letter, for there is some note or memorandum of it in writing, subscribed by the party to be charged thereby, the subscription made by an authorized agent. And so are the authorities: *Johnson v. Trinity Ch. Society*, 11 Allen, 123; *Tufts v. Plymouth Gold Mining Co.*, 14 Id. 407; *Chase v. City of Lowell*, 7 Gray, 35; *Dykers v. Townsend*, 24 N. Y. 57.

The resolution of the 26th January, 1863, is a full note or memorandum of an agreement as to the work which the defendant agreed to have done. Nor did this resolution expire by any limitation of its own, at the end of three years from its adoption, and so require a new passage to be still operative. Until rescinded in terms it was lasting in its expression of a determination by the city to have its printing done at certain rates, by one daily paper to be designated by the city. It was this designation only which had a limit to a term of three years. The resolution as to all but the party with whom the agreement was to be, was perpetual, unless rescinded by action of the city; and it needed nothing but the designation of some daily paper, at the end of each term of three years, entered upon the daily minutes, signed by the clerk, to do all which the city need do, to make a note or memorandum in writing, subscribed by the party to be charged thereby.

The resolution of 15th January, 1866, also recorded in the minutes and signed by the clerk, designating anew the plaintiff's daily paper, started another term of three years. For the agreement was already there, save the name of the party to be agreed with, and that this resolution supplied.

Nor did this last resolution need to be passed with a call of the ayes and nays, and they entered upon the record. It was not a law or a resolution involving an appropriation or payment of money for any purpose: Laws of 1848, chap. 139, p.

217, § 1. The purpose was decided upon by the former resolution. The design of the provision of the Act of 1848 is to expose to accountability to the public those who in places of public trust sanction new objects and purposes for the expenditure of public money. An expenditure having been once determined upon it does not again involve it, that by resolution one is selected to do the work, any more than where an office under the city government, having been created by resolution and a compensation having been attached to it, by a subsequent resolution one is named to fill it.

Nor does the resolution contemplate that the chamberlain is to negotiate for the publication of the proceedings of the board at a sum less than \$1000. It is a proposal—in connection with the other resolution, designating the plaintiff's paper as the official organ—to the plaintiff, to pay it not to exceed \$1000 for doing certain work; the plaintiff's answer is an acceptance of that sum and an agreement to do the work therefor. It is different from *Haydock v. Stow*, 40 N. Y. 364. That was a power intrusted to an agent, with a *minimum* limit of price, but no *maximum*; and hence the duty of the agent to his principal to obtain more if he might. This is an offer by one party to another, which the other accepts without intervention of an agent, and the *maximum* compensation named is the compensation agreed for. Besides, the direction to the chamberlain does not contemplate any change of the terms of the resolution; he is directed to enter into a contract *accordingly, i. e.*, in the terms specified in the resolution. Moreover, before the second resolution of designation, he has already done his duty in making the contract, with which the defendant is satisfied. The second resolution, of January 16, 1866, is an offer by the defendant to renew it for another term of three years; and so the defendant does not remain free from obligation, under that resolution, until the chamberlain has again entered into a contract. The contract which he was directed to make, expressing no more in fact than the resolution of 1863, was satisfactory to the defendant. The defendant, agreeing to the terms of that resolution and contract, by the resolution again designating the daily paper of the plaintiff, proposed to it to renew the same for another term of three

years. As soon as the plaintiff signified in writing its acceptance of that proposal, the contract was renewed for another three years' term, and, as we have seen, was legally embodied in writing, and was subscribed according to the statute. A letter from a party to be charged, specifying the terms of an agreement, and directing an assignment to be drawn in accordance with it, is a good memorandum of the contract, though the assignment never be made. See *Smith v. Watson*, cited in *Gibson v. Holland*, Law Rep. (1 Com. Pl.) 6. The common council did not contemplate not being bound, until a contract other than the resolutions and some acceptance of it was made. Those cases which have turned on such point have been where a further contract was needed to express the details of the bargain, where those had yet to be arranged between the parties.

Nor does the fact that the rates for printing and binding are not expressed, but reference is made to something outside of the contract, and which must be established by parol testimony, invalidate the contract. This contract is not so much open to objection for this cause, as if no price was expressed, nor reference made to anything by which it might be determined, and the parties were left to proof of a *quantum meruit*. Yet, in such case, a memorandum has been held to be in compliance with the statute: *Hoadly v. McLaine*, 10 Bing. 482; *Ashcroft v. Morrin*, 4 M. & G. 450. The first resolution does not require that the chamberlain ascertain what the current rates are, when he enters into his contract, and make them the rule of compensation the three years through. What he is to do, if he does aught, is to put into his contract the phrase of the resolution. For the designation and the contract is for three years; and the rates current at the beginning of the term may be quite different from those current in any other part thereof. Yet it is for the rates current in the city, at any time and at all times through the term of three years, that the defendant contracts, willing to pay its designated official paper so much and no more, and asking work for no less than at the terms current for the same service, in the city where the work is done, from time to time.

Nor is the idea that there was no delivery to the plaintiff of the resolution of 1866, one that can prevail. There had once

been delivery of the same agreement and performance of it by both parties. It was not changed. The resolution of 1866 was but a proposal to the plaintiff to renew it. It was adopted 16th January, 1866. The first term of three years did not end until 26th January, 1866. Until that day, under the first contract, all proceedings of the common council were reported for, delivered to, and published in, the paper of the plaintiff. The resolution of January, 1866, at once on its passage, was reported for and delivered to the plaintiff to the knowledge of the defendant's agents. Nor is it always needed that there be delivery to the other contracting party, to bind the one who is sought to be charged by the note or memorandum. Where one, by his agent, has dealt with another, a written communication to the agent, reciting the terms of the agreement made by the agent with that other, and ratifying the same, will answer the statute: *Gibson v. Holland, supra*. And so will a written communication to the other, expressive of the terms, yet repudiating an obligation: *Bailey v. Sweeting*, 9 C. B. (N. S.) 843. The plaintiff did accept the proposal for a renewal, by filing its written acceptance with the clerk of defendant. The clerk had no authority to make a contract or to assent to a proposition for one. But he was the custodian of the papers of the common council, and an organ of communication between it and those not members of it. It also accepted it, by acting under it to the knowledge and with the assent of defendant's agents: *Smith v. Neale*, 2 C. B. (N. S.) 66.

The plaintiff has a good cause of action on the contract; but for the reason given by the General Term, it was proper that there should be a new trial, rather than judgment absolute ordered in that Court. But there being a stipulation under the eleventh section of the Code, on appeal to this Court, the order of the General Term should be affirmed, and judgment absolute for the plaintiff.

All concur, except GROVER and RAPALLO, JJ., dissenting.

Order reversed, and judgment accordingly.

Tufts v. Plymouth Co., 14 Allen, 407; *Chase v. The City of Lowell*, 7 Gray, 33.

The "note or memorandum" may even be contained in a letter to a third person signed by the party charged therewith: *Moss v. Atkinson*, 44 Cal. 3; *Spangler v. Danforth*, 65 Ill. 152.

CONSIDERATION.

The words "for value received" are a sufficient expression of the consideration.

OSBORNE v. BAKER.

Supreme Court of Minnesota, 1885.

34 Minn. 307.

MITCHELL, J. This action was brought upon defendant's guaranty of payment of certain promissory notes executed to plaintiff by one Gunderson. The guaranty, which was endorsed on each of the notes, was as follows: "*For value received*, I hereby guaranty the payment of the within note at maturity," and was signed by defendant.

The evidence offered on the trial, if admitted, would have tended to prove that this was an original, and not a collateral, undertaking, and hence not within the Statute of Frauds. It showed that the guaranty was executed in pursuance of a previous written agreement between the parties, by which defendant, as plaintiff's agent, was, for a certain commission, to sell their machinery and guaranty the payment of all notes taken by him on sales; in substance, a *del credere* agency. Such a guaranty is an original one, entered into in performance of the guarantor's own responsibility, and in no sense a special promise to pay the debt of another, within the meaning of the Statute of Frauds: *Nichols v. Allen*, 22 Minn. 283; *Sheldon v. Butler*, 24 Id. 513; *Wilson v. Hentges*, 29 Id. 103; *Wolff v. Koppel*, 5 Hill, 458; *Couturier v. Hastie*, 8 Exch. 40. The Court, however, excluded the evidence upon the ground, as we understand the record, that it was not admissible under the pleadings; that the guaranty pleaded was a special promise to answer for the debt of another; and that the words, "for value received," did not *express the consideration*, as required by the Statute of Frauds: Gen. St. 1878, c. 41, § 6.

The conclusion we have reached on this latter question ren-

ders it unnecessary for us to decide whether the Court erred in excluding the evidence. The statute provides that no action shall be maintained upon any special promise to answer for the debt, default, or doings of another, unless such agreement, or some note or memorandum thereof, *expressing the consideration*, is in writing and subscribed by the party charged therewith. If this was a new question, we have not much doubt that we would hold with the respondent that the words, "for value received," which acknowledge the receipt of a consideration, do not express *the consideration*. But we think that, under the authorities, the question is foreclosed, and is really no longer an open one. So far as the question has ever been passed upon by the Courts of this country, it has been invariably held, so far as we can ascertain, that the words, "for value received," sufficiently express the consideration to amount to a compliance with the requirements of the statute. This seems to be so both in those States whose statute, like ours, expressly requires the consideration to be expressed, and in those which have adopted the English statute, and whose Courts follow the doctrine of *Wain v. Warlters*, 5 East, 10. That this is the law in New York, the leading commercial State of the Union, would now seem settled beyond doubt, although the decisions of the Courts of that State upon the question are undoubtedly subject to many of the criticisms made by counsel. See *Miller v. Cook*, 23 N. Y. 495, and cases cited. The same is the rule in Wisconsin, our next neighbor, and with whom we have the most intimate business relations: *Day v. Elmore*, 4 Wis. 190; followed in *Cheney v. Cook*, 7 Id. 413, and *Dahlman v. Hammel*, 45 Id. 466. This is also the law in Maryland: *Edelen v. Gough*, 5 Gill, 103. Also, it would seem, in Delaware: *Brooks v. Morgan*, 1 Harrington, 123. Also, in South Carolina: *McMorris v. Herndon*, 2 Bailey, 56, and *Caldwell v. McKain*, 2 Nott. & McC. 555; although subsequently, in that State, it was held that the consideration need not be expressed at all, repudiating the doctrine of *Wain v. Warlters*. The same thing has, we think, in effect, been held in Vermont: *Lapham v. Barrett*, 1 Vt. 247; and in Maine: *Whitney v. Stearns*, 16 Me. 394. It is true that in neither of the last two cases does it clearly appear that the question of the Statute of Frauds was distinctly

raised, but it must have been in the minds of the Courts; for in both cases the promise was within the statute, and the words "for value received" were held sufficient. We have found no case, and have been referred to none, which holds to the contrary.

The text-writers also generally state the law to be that the words "for value received" sufficiently express the consideration: 3 Pars. Cont. 16; Browne, St. Frauds, § 408*a*; 1 Reed, St. Frauds, § 430; Brandt on Suretyship, § 70; Daniel, Neg. Inst. § 1767; Baylies on Sureties, 87.

The result of all this is, we are satisfied, that it has become the general understanding that this is a sufficient compliance with the statute, and that the business engagements of the country are commonly made with that understanding. Under these circumstances we do not feel at liberty to adopt a different rule. As was said in *Day v. Elmore*, *supra*, the mischief of attempting to do so would be much greater than that of a quiet acquiescence in the one already established, as the latter may answer a liberal construction of the statute. If this rule would result in nullifying the statute, as is claimed by appellant, we would not feel prepared to follow it, although so generally adopted in other States. But we are satisfied, not only that the rule does not work any mischief, but also that it is an eminently convenient one. The object of the Statute of Frauds, as its name indicates, was to prevent men from being, through fraud or perjury, held liable for engagements which they never made. To prevent this wrong, it was eminently proper that their promises or agreements (using the latter word in its popular sense) should be put into the durable form of a writing, and not left to the uncertainty of verbal testimony. But, notwithstanding all that has been said in *Saunders v. Wakefield*, 4 Barn. & Ald. 595, and in other cases, it has never seemed to us that there was any necessity, in order to prevent the mischief aimed at, for requiring all the motives and considerations which induced the party to make the promise, to be reduced to writing. See *Packard v. Richardson*, 17 Mass. 121. If the promise or undertaking is reduced to writing, we confess we can see no reason why the existence or non-existence of a consideration for it might not be left to be proved by parol, as in the case of any

other contract. If there is any reason for expressing the consideration at all, the true one ought to be expressed; and yet it has been held that the expression of a nominal or false one is sufficient. See *Childs v. Barnum*, 11 Barb. 14, and *Happe v. Stout*, 2 Cal. 460. It is the law that a seal is a sufficient substitute for the expression of the consideration: 1 Reed, St. Frauds, § 431. But while a seal imports *a* consideration, yet it no more expresses *the* consideration than do the words "for value received."

The fact is that the expression of the consideration is so unnecessary in order to prevent the mischief aimed at, and frequently so inconvenient, that the Courts have always been inclined to give this provision of the statute a very liberal construction, which sometimes, as in the instances cited, reduces it to a mere formality. As is well known, the rule was for the first time announced, or even suggested, in England in *Wain v. Warlters*, 5 East, 10, over one hundred years after the statute was enacted, and was mainly based upon the assumption that the word, "agreement," was used in its strict legal, and not in its popular, sense, which was argued from the well-known accuracy of Sir Mathew Hale, who was supposed (probably mistakenly) to have drawn the statute. And while some of the States, like our own, have, in adopting the statute, expressed in words what had become its settled construction in England, yet the rule was never satisfactory, having been repudiated in many of the States, and finally changed by statute in England itself in 1856: 19 & 20 Vict. c. 97, § 3.

While these considerations furnish no reason for disregarding the requirements of the statute, yet they are not without some weight in determining whether we should follow the liberal construction which has generally obtained elsewhere. There is nothing in *Wilson S. M. Co. v. Schnell*, 20 Minn. 33 (40), which commits the Court to any other rule. In that case, we simply held, what is everywhere held, that it is not necessary that the consideration should be stated in express terms, but that it is enough if it may be spelled out or inferred from the memorandum.

Order reversed.

BY WHOM SIGNED.

The memorandum need not be signed by both parties; it is enough if it is subscribed by the party against whom it is sought to be enforced.

MORIN v. MARTZ.

Supreme Court of Minnesota, 1868.

13 Minn. 191.

BERRY, J.

“SAINT PAUL, April 27, 1866.

“We, the undersigned parties, have sold this day to Mr. H. Morin, of St. Paul, four thousand (4000) bushels of No. 1 wheat, at one dollar and ten cents per bushel (\$1.10), to be delivered and shipped on board of boat at Strait Landing, (2000) two thousand bushels to be shipped on or before the fifteenth (15th) day of March, 1866, and the balance to be shipped during the balance of said month.

(Signed)

“FRANK MARTZ,

“MICHAEL SIMMER.”

This action is brought to recover damages for a failure to deliver and ship the wheat mentioned in the foregoing instrument according to the terms thereof. Sec. 3, ch. 50, Pub. St., provides that “every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless a note or memorandum of such contract be made in writing and subscribed by the parties to be charged therewith.” The defendants contend that the instrument above recited does not satisfy the requirements of the statute, because it is subscribed by the vendors only, and that the complaint is insufficient, because, although alleging that a memorandum of the contract of sale was made in writing, and duly subscribed by defendants, it does not allege that it was signed by all the parties to such contract. But the construction, which

has quite uniformly been put upon the Statute of Frauds is otherwise. In *Clason v. Bailey*, 14 Johns. 487, Chancellor KENT says, "it is sufficient if the agreement be signed by the party to be charged. It appears to me that this is the result of the weight of the authority both in the Courts of law and equity." See also the opinion of Senator Verplanck in *Davis v. Shields*, 26 Wend. 362. The Statute of Frauds was enacted in the reign of Charles II., nearly two hundred years since, and the same construction placed upon this portion of it by Chancellor KENT has been adopted with a remarkable approach to unanimity, not only in England, but in this country. Prof. PARSONS says: "And it is now quite settled, that the agreement need not be signed by both parties, but only by him who is to be charged by it:" 3 Pars. Con. (5th ed.) 9, and numerous authorities cited; *Fenley v. Stewart*, 5 Sand. (S. C.) R. 105; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25; *Browne on Statute of Frauds*, sec. 365; 1 Smith L. Cases, 466.

It will also appear, from the authorities cited, that the language "who is to be charged by it," is held equivalent to the language "who is to be charged by it in the suit," or "against whom it is sought to be enforced." It is urged in this case that the use of the plural word "parties" is significant when read by the light of other portions of the same statute in which the singular word "party" is made use of, and that it is fair to infer that the Legislature intended to comprehend in the term "parties" all the parties to the contract. In *Clason v. Bailey*, p. 490, Chancellor KENT adverts to this point, saying—"There is a slight variation in the statute respecting agreements concerning the sale of lands and agreements concerning the sale of chattels, inasmuch as the one section (being the 4th section of the *English* and the 11th section of our statute) speaks of the *party*, and the other section (being the 17th of *English* and 15th of ours) speaks of the *parties* to be charged. But I do not find from the cases that this variation has produced any difference in the decisions. The construction as to the point under consideration has been uniformly the same in both cases." It would seem, then, that by a strong and united current of authority, the signification of the words "parties to be charged therewith," or of words equivalent in

the Statute of Frauds, has been settled by adjudications reaching over a very long period of time. These words have acquired a meaning which it was not absolutely necessary to give them in the first instance; a meaning which has been frequently regretted by Courts, but nevertheless a meaning settled and established by long usage. There is no practical, rational way of determining the meaning and definition of words and phrases, except by inquiring in what sense they are usually employed in the connection in which they are found. And following this course we are of opinion that the Legislature must have intended to use and must have used the words "parties to be charged therewith" in the sense in which they have generally been used and understood in like cases. We hold, therefore, that the subscribing of the note or memorandum of the contract in this case, by the vendors alone, was a sufficient subscription under the statute, in an action brought against them.

Judgment affirmed.

Wemple v. Knapf, 15 Minn. 440 ; Justice v. Lang, 42 N. Y. 493 ; W. U. Tel. Co. v. R. R. Co., 86 Ill. 246.

CONTRACTS THAT MUST BE IN WRITING.

I.

Every agreement that *by its terms* is not to be performed within one year from the making thereof must be in writing.

COWLES v. WARNER.

Supreme Court of Minnesota, 1876.

22 Minn. 449.

CORNELL, J. It is conceded that the contract sued on was a parol contract, no part of which was reduced to writing, or signed by either party. It follows that if by its terms it was not to be performed within one year from the making thereof,

it was within the Statute of Frauds, and no action can be maintained upon it to recover damages for a breach of any of its obligations: Gen. St. ch. 41, § 6. In other words, if the contract was an entirety, and was necessarily to continue in force for a period of time extending beyond the prescribed year, so that its obligations could not be performed within that year, then it was void under the statute. If, however, beginning within the year, it was to continue in force for an indefinite period of time, with the right to either party to terminate it at any moment before the expiration of such year, and its obligations were of such a character that they could all be performed within that period, without contravening any of its terms, then it was without the statute, and was a valid and binding contract.

No question seems to have been made on the trial that the establishment and maintenance of the commercial agency mentioned in the complaint, whatever it was, were exclusively within the control of the defendant, and subject to his will, nor does it seem to have been controverted that the complaint was sufficiently specific in its averments to allow proof of such fact, as well as of the fact that the contract contemplated the maintenance of such an agency, and the prosecution of the business connected therewith, after the opening of the office, for the time and upon the terms mentioned in the complaint. Under these circumstances the Court had the right to construe the contract set out in the complaint in the light of these assumed facts.

Thus regarded, the Court was perhaps warranted in holding that the contract declared on was one for the establishment of the agency at the place indicated; the plaintiff on his part agreeing to procure the requisite subscribers, and, upon being furnished by defendant with the necessary authority, and the books and stationery therefor, at their joint expense, to open the office on July 1, 1874, and thereafter to conduct the business of the agency, upon the terms specified, so long as it might continue, and the defendant on his part agreeing to give such authority, and to furnish such necessary books and stationery in time to open the office; and that such contract was to continue in existence, after the office was opened, during the pleasure of

the parties, with the right to either to terminate it at any moment. Such a contract, even though resting in parol, would not be invalid by reason of anything in the Statute of Frauds, because by its terms it was not necessary to continue beyond a year.

Upon the trial, however, the plaintiff, in proving the contract, established, as facts uncontroverted, that the contract in question was completed on June 6, 1874, and that it was to continue in force for at least one full year from and after July 1, 1874. His testimony upon the subject of the duration of the contract is as follows: Speaking of their discussion of the details of the agreement on June 6, he says: "We (plaintiff and defendant) discussed the duration of the contract. He (defendant) said he did not want to make any permanent contract that he could not get rid of. He agreed, if at the end of a year from July 1, 1874, he wished to discontinue the business, he would compensate me (plaintiff) for my disappointment and trouble in leaving the business by fixing a specific sum of \$1000 to be paid me at the end of the year, also \$25 for each subscriber in active operation at that time. . . . If I had seen fit to go out at the end of the year, I was to have \$1000 and the amount received from subscribers." This is all the testimony bearing upon this point, and, taken in connection with the subject-matter of the contract, and its other provisions, unmistakably fixes its character as one which by its terms was to continue for at least the definite period of a year from said 1st day of July, and whose obligations could not be fully performed till the full expiration of that time. In this respect it was clearly embraced within the Statute of Frauds, and void, and was materially variant from the contract described in the complaint. On this ground the defendant's motion for a dismissal of the action, at the close of plaintiff's testimony, should have been granted.

Order reversed, and new trial granted.

Heath v. Heath, 31 Wis. 223 ; *Kent v. Kent*, 62 N. Y. 560 ; *Fenton v. Emblers*, 3 Burrows, 1279.

If the contract is executed by one party, and all that remains for the other to do, is to pay a specific sum of money, then the agreement is not within the statute : *Curtis v. Sage*, 35 Ill. 22.

A parol lease of real estate for the term of one year, to commence in the future, is within the statute.

JELLETT *v.* RHODE.

Supreme Court of Minnesota, 1890.

43 Minn. 166.

DICKINSON, J. July 10, 1889, these parties entered into an oral agreement, the plaintiff leasing to the defendant certain real property for the term of one year from the 1st day of August, at a yearly rental of \$780, payable in monthly instalments in advance. The defendant entered into the occupancy of the premises on the 1st day of August, and remained in possession until the 28th of September, when he went out. This action is for the recovery of the stipulated monthly rental for the month of October, payable, according to the terms of the agreement, on the 1st of that month.

By the terms of our Statute of Frauds, Gen. St. 1878, c. 41, title 2, no action is maintainable upon a mere parol agreement that by its terms is not to be performed within one year from the making thereof (section 6); no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust, etc., shall be created unless by act or operation of law, or by deed or conveyance in writing, etc. (section 10); and every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party by whom the lease or sale is to be made, or by his authorized agent (section 12). The agreement upon which this action is prosecuted is clearly within the language of section 6. By its terms the agreement was not to be performed within one year from its making. There is no reason why that section should not be deemed applicable to such a case as this, unless it is to be considered that the exception in section 10,

and the implied exception in section 12, of leases "for a term not exceeding one year," or for a period not longer than one year, are effectual to exclude from the operation of section 6 leases for a term of one year, to commence *in futuro*. The reasons which led to the enactment of that part of section 6, above referred to, are as applicable to parol agreements leasing land, not to be performed within one year, as in respect to any other kind of a contract. The evil result likely to follow from allowing such a contract, the performance of which is to be long postponed, to rest in parol, without any written evidence showing the terms of the agreement, are of the same nature, and just as likely to occur, as in the case of any other contract. If a merely oral lease may be effectually made for a year to commence *in futuro*, it matters not how long the commencement of the term may be postponed. If such a case is not within the provision of section 6, then a lease may be thus made for a term to commence many years subsequent to the agreement. Such a case is so clearly within the plain, explicit language of section 6, and would so obviously involve the very evils to avoid which has been the well-understood purpose of this clause of the Statute of Frauds that it should be construed as applicable, unless the other sections of the law very clearly manifest the intention to withdraw or exclude such cases from its operation. Such an intention is not manifest. Full effect may be given to the excepted cases in section 10, and to cases within the implied exception in section 12, consistently with the applicability of section 6 to parol leases for a term not to be completed within one year. "Leases for a term not exceeding one year," or for a period not longer than one year may be made, if the term is to commence at once, and such a contract would not come within the terms of the statute as to agreements not to be performed within one year. We see no sufficient reason, either from the terms or arrangement of the statute, for excluding such cases as that before us from the operation of section 6. In this conclusion we are supported by the following authorities: *Olt v. Lohnas*, 19 Ill. 576; *Wheeler v. Frankenthal*, 78 Id. 124; *Wolf v. Dozer*, 22 Kan. 436; *Briar v. Robertson*, 19 Mo. App. 66; *Parker v. Hollis*, 50 Ala. 411; *Atwood v. Norton*, 31 Ga. 507; *White v. Holland* 17 Or. 3

(3 Pac. Rep. 573). See also *Roberts v. Tennell*, 3 T. B. Mon. 247.

The decisions upon the English Statute of Frauds (29 Car. II. c. 3) have but little bearing upon the construction of our statute, for the reason that by that statute parol leases for a term not exceeding three years from the making thereof were authorized, and of course the provision in section 4, as to agreements not to be performed within one year, could not be applicable to such cases. The same is true as to the statute of Indiana, in which State parol leases like that under consideration are held valid. In *Young v. Dake*, 5 N. Y. 463, it was held, overruling *Croswell v. Crane*, 7 Barb. 191, that such a lease was valid. The decision, however, was placed upon considerations which cannot be regarded under our statute. One of these considerations was the fact that in the revision of the statute the Legislature eliminated from the clause of the Statute of Frauds, excepting leases for a term not exceeding one year, the qualifying words "from the making thereof," which was regarded as disclosing the intention to allow such a term to commence *in futuro*. Again, it was considered that the statutory provision as to contracts which by their terms were not to be performed within one year was not applicable to contracts relating to leases of, or interests in, real estate, for the reason that the former provision was embraced in title 2 of the statute entitled, "Of fraudulent conveyances and contracts, relative to goods, chattels and things in action," while the provisions in which parol leases of real estate were authorized are found in title 1, relating to "fraudulent conveyances and contracts relative to lands." This reason for the decision in *Young v. Dake* is not available under our statute since the Revision of 1866, in which all of the provisions under consideration are embraced in one title, denominated "Statute of Frauds." In Michigan and Wisconsin the statutes in this particular have been arranged and entitled as in New York, and in those States *Young v. Dake* has been followed, or cited with approval. It has also been followed in some other States, where the reasons upon which that decision was made were wholly inapplicable.

Judgment reversed.

But see *Young v. Dake*, 5 N. Y. 463.

II.

Every special promise to answer for the debt, default, or doings of another, must be in writing.

1.

Where such promise is made at the same time, or before, the credit is given, or the debt incurred, as in the sale of goods, it is within the statute, and must be in writing.

COLE v. HUTCHINSON.

Supreme Court of Minnesota, 1886.

34 Minn. 410.

GILFILLAN, C. J. Action for goods sold and delivered. The goods were selected by and delivered to James D. Hutchinson, for his use, and the prices for them agreed upon by him and plaintiff. The defendant had no part in it nor connection with it unless by virtue of an alleged promise by him to plaintiff's firm, made some time before, when James D. was not present, to pay for such goods as the latter should take. From the evidence as to this promise, plaintiff claims that it was an order for goods to be delivered to James D., and that the sale, when made by the delivery of the goods, was to defendant, and that the debt thus accruing was his debt as purchaser. On the other hand, defendant claims that, at most, it proves only a promise to answer for any debt that James D. might incur in the purchase of the goods, and that it is therefore within the Statute of Frauds, and, not being in writing, is void. The evidence of the conversation in which the promise was made was such that the jury might have found the promise as claimed by either party, and the verdict could not have been disturbed.

The Court below instructed the jury, in substance and effect,

that to bring a promise within the Statute of Frauds as one to answer for the debt of another, there must be in existence at the time when the promise is made an original liability upon which the collateral promise is founded. The Court may have so stated the law through inadvertence, but it must, nevertheless, have set the jury astray. The majority of the cases arising under this part of the Statute of Frauds, and upon which elaborate discussion has been had, have been cases where there was no debt or liability in existence when the promise was made. To show how far wrong such a statement of the law is, we need go no further than to suppose the promise in this case to have been: "You sell to James D. whatever goods he wants; and if he does not pay for them, I will." The terms of such a promise would not contemplate a sale to defendant, nor upon his credit as purchaser and principal debtor, but only a sale to James D., he becoming primarily liable for the price, and the defendant to be liable only in the event of his failure to pay. None could doubt that such a promise would be collateral and within the Statute of Frauds. For the error in this instruction there must be a new trial.

In view of such new trial, we deem it proper to consider a feature of the case not yet alluded to: that is, the fact indicated, if not established, by the evidence that when James D. got the goods he gave his promissory notes for the price. This would not only have justified the jury in finding that the credit was given to James D. (so as to make defendant's promise collateral), but certainly, in the absence of adequate explanation (and the evidence does not suggest any), it would be conclusive upon the point. Although the promise were such as to authorize a delivery of the goods to James D. on the credit of defendant as purchaser, yet if that was not done,—if they were in fact sold and delivered to James D., and credit given to him as purchaser,—then the original debt for them is his debt, and the case is within the statute.

In *Cahill v. Bigelow*, 18 Pick. 369, Chief Justice SHAW states as the test whether the promise is collateral when it is made before the credit is given: "Was credit given to the person receiving the goods? If it was, then such promisor is a guarantor only, undertaking to pay another debt. If no credit was given

to the person receiving the goods, then the promisor is himself debtor for goods sold to him, and delivered to another person by his order." 3 Kent, Comm. 123, states it: "If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral, and must be in writing." This, as the general rule, is followed by a practically unbroken line of decisions. From the mass of them we cite only a few: *Brown v. Bradshaw*, 1 Duer, 199; *Cowdin v. Gottgetreu*, 55 N. Y. 650; *Post v. Geoghegan*, 5 Daly, 216; *Swift v. Pierce*, 13 Allen, 136; *Bugbee v. Kendrick*, 130 Mass. 437; *Walker v. Richards*, 39 N. H. 259; *Welch v. Marvin*, 36 Mich. 59; *Boykin v. Dohlonde*, 37 Ala. 577; *Billingsley v. Dempewolf*, 11 Ind. 414; *Elder v. Warfield*, 7 Har. & J. 391; *Wyman v. Gray*, Id. 409.

The credit mentioned in stating the rule must be understood credit as purchaser of the goods, for the receiver of the goods might by express terms assume the liability of a guarantor. He might undertake to pay in case the other did not. But where both are liable, whichever is original, primary debtor, the promise of the other must of necessity be collateral. If the debt be a debt of the receiver of the goods, then the promise of the other is to answer for his debt, and is within the statute. Upon whose credit as purchaser the goods are sold will usually be determined by what takes place when they are called for and delivered,—by what takes place between the parties to the transaction,—not by any mental reservation nor secret motive on the part of either. In this case, the giving and taking of the notes appear to have been a part of the transaction, both parties concurring in it. It is different from charging the price against the receiver in the seller's books, or demanding pay from him, or suing him for it, for that is the act of one of the parties after the fact, and is evidence, like an admission by him; and it may be shown to have been due to a misapprehension.

Order reversed.

2.

Where such promise is made *after* the debt has been contracted (in which case the promise must rest upon some new consideration, as a forbearance to enforce the claim), it is within the statute, and must be in writing.

MALLORY v. GILLET.

Court of Appeals, New York, 1860.

21 N. Y. 412.

COMSTOCK, C. J. This case ought to be one of first impression. By the Statute of Frauds, all promises to answer for the debt of a third person are void unless reduced to writing. One Haines owed the plaintiff a debt for repairs on a boat, for which the latter had a lien on the chattel. In consideration of the relinquishment of that lien, and of forbearance to sue the original debtor, the defendant promised the plaintiff, without writing, to pay the debt at a certain future time. There is no pretence that the defendant's promise was given or accepted as a substitute for the original demand, or that such demand was in any manner extinguished. The promise was, therefore, to answer for the existing and continuing debt of another, or, in the language of the books, it was a collateral promise. The consideration was perfect, but, as there was no writing, the case seems to fall within the very terms of the statute. Authorities need not be cited to prove that the sufficiency of the consideration never takes a case out of the statute. Indeed, there can be no question under the Statute of Frauds in any case until it is ascertained that there is a consideration to sustain the promise. Without that element, the agreement is void before we come to the statute. A naked promise is void on general principles of law, although it be in writing. The mere existence of a past debt of a third person will not sustain an agreement to pay it, unless there be forbearance to sue, or some other new consider-

ation. In such a case, when we find there is a new consideration, we then, and not till then, reach the inquiry whether the agreement must be in writing. Such is this case. It is nothing to say that here was a new consideration. If such were not the fact, there would be no question in the case.

There is sometimes danger of error creeping into the law through a mere misunderstanding or misuse of terms. The words "original" and "collateral" are not in the Statute of Frauds, but they were used at an early day—the one to mark the obligation of a principal debtor, the other that of the person who undertook to answer for such debt. This was, no doubt, an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented in these terms, the word "original" has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original because they are new; and then as original undertakings are agreed not to be within the Statute of Frauds, so these new promises, it is often argued, are not within it. If the terms of the statute were adhered to, or a more discriminating use were made of words not contained in it, there would be no danger of falling into errors of this description.

What is a promise to answer for the "debt or default" of another person? Under this language perplexing questions may arise, and many have arisen, in the Courts. But some propositions are extremely plain; and one of them is that the statute points to no distinction between a debt created at the time when the collateral engagement is made, and one having a previous existence. The requirement is, that promises to answer for the debt, &c., of a third person, be in writing. The original and collateral obligations may come into existence at the same time, and both be the foundation of the credit, or the one may exist and the other be created afterwards. In either case, and equally in both, the inquiry under that statute is, whether there be a debtor and a surety, and not when the relation was created. The language of the enactment is so plain that there is no room for interpretation; and its policy is equally clear. If A. say to B., "If you will suffer C. to incur a debt for goods which you will now or hereafter sell and deliver to him,

I will see you paid," the promise is within the statute. This no one ever doubted. But if A. say to B., "If you will forbear to sue C. for six months on a debt heretofore incurred by him for goods sold and delivered to him, I will see you paid"—is not the case equally plain? So if in such a case instead of forbearance there is some other sufficient consideration, for example, forgiving a part of the debt or relinquishing some security for it, the difference is still one of circumstance, but not of principle. In the case first put the consideration of the guaranty is the original sale of the goods on the faith of it; in the other it may be forbearance or the relinquishment of some advantage, the original debt still remaining. Looking at the comparative merit of these considerations, it would seem to be the highest in the first case, for the whole debt owes its origin to the collateral promise, while in the other the debt remains as before, and only some collateral advantage is lost. But the application of the statute depends on no such test. These considerations are, all of them, sufficient, and simply sufficient, to sustain the auxiliary undertaking. But if they also dispense with a writing, then, so far as I can see, there are no cases to which this branch of the Statute of Frauds can be applied.

Such an extreme position has not been taken; but it is said that the promise now in question need not be in writing, because it was new and original, and was founded on the relinquishment to the debtor of a security which the creditor held. To say that it was new and original expresses no idea of any importance. Every promise is new and original that was never made before. An undertaking to answer for an old debt of a third person certainly has no more of originality than one to answer for a debt now contracted. As to the relinquishment of the lien or security, this, although a meritorious consideration, is in judgment of law no more so than any other which is sufficient to sustain a contract. Forbearance to sue has the same legal merit, and so has the release of a part of the debt.

There is nothing so remarkable or peculiar about this case that it may not be included in some general proposition which involves a principle of law. Now, one of these two propositions must, I think, be true: 1. The Statute of Frauds never

applies to a promise, the subject of which is an antecedent debt of a third person to which it is collateral; or, 2. It applies to all such promises where the consideration moves solely between the creditor and original debtor and the debt still remains. If the first is true, then the promise in question is valid without a writing, and so would any such promise be, without regard to the particular nature of the consideration; it being necessary, of course, that there should be some sufficient consideration. If the first be not true and the second is, then the promise in this case is void, because it falls directly within it. The first proposition cannot be true, upon the plain terms and evident policy of the statute; and no such doctrine was ever asserted. The universal truth of the second one necessarily follows, unless the law will discriminate between different promises according as the consideration may differ in the particular nature or kind. But is such a discrimination possible, so long as in any given case the consideration is sufficient in the eye of the law, and moves solely between the original parties? No one, it seems to me, can hesitate to answer such a question in the negative. Yet we are told, without reason or principle, that when a creditor releases a security to the debtor, although without releasing the debt, a promise of another person, founded on that peculiar consideration, is not within the statute. The inevitable logic of such a proposition will include a like promise founded on any other consideration equally sufficient to sustain a contract; and therefore we are carried back to the first general proposition above stated, which is admitted to be false. It has already been observed that, without a consideration, no question on the Statute of Frauds can arise.

In this elementary view of the question I do not understand that much difference of opinion exists. It is claimed, however, that the course of adjudication has been such that we cannot determine the case before us according to a consistent rule of law. This argument is founded in a misapprehension of the authorities, some reference to which will be necessary.

In this State an early case, and one of very high authority, is that of *Leonard v. Vredenburg*, 8 Johns, 29, in which Chief Justice KENT divided the cases on this branch of the Statute of Frauds into three classes, as follows: 1. Where the promise

is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the original credit. 2. "Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise." "Here," the Chief Justice observed, "there must be some further (or new) consideration shown, having an immediate respect to such liability ; for the consideration of the original debt will not attach to this subsequent promise. 3. Cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." "The two first classes," he further observed, "are within the Statute of Frauds, but the last is not." I suppose, in the light of later decisions, that the opinion of that great jurist, delivered in the case cited, may contain some inaccurate remarks respecting the right to prove a consideration for a collateral agreement where none appeared in the writing. It would be so considered, especially since the change we have made in the language of the Statute of Frauds, requiring the consideration to be expressed in the collateral instrument. But the above classification of the cases, and the connected remarks respecting each class, are strictly correct, and they have been a landmark of the law for forty years. Does the present case belong to the second class, which is within the statute, or to the third, which is not? Manifestly, it belongs to the second, because that is a class where the undertaking is subsequent to the creation of the debt. It does not fall without that class in consequence of the newness of the consideration, because, the learned Chief Justice said, "here must be some further [new] consideration having an immediate respect to such liability." It cannot fall within the third class, because, if we arrange it there, we necessarily compress the two classes into one, or, more properly speaking, we merge the second wholly into the third. In such a disposition of the present question, no second class is left of collateral undertakings subsequent to the creation of the original debt, founded, as they must be, on some new or "further consideration."

The classification referred to, on a casual reading, is perhaps open to some misapprehension, and I think it has been occa-

sionally misapprehended. What, then, is the true distinction between the second and third classes? They are both of them promises, in form at least, to pay the antecedent debt of a third person, and in that respect they are alike. The distinction, therefore, is in the *consideration* of the promises which belong to the two classes; not in respect to its particular nature or kind, but in respect to the parties between whom it moves. In the one class, the consideration is characterized as a "further one, having immediate respect to the [original] liability" of the debtor; in the other, as "new and original moving between the newly contracting parties." In the second class, the new or "further" consideration moves to the primary debtor. It may consist of forbearance to sue him, of a release to him of some security, or of any sufficient benefit to him or harm to the creditor, but in which the collateral promisor has no interest or concern. In the third class the consideration, whatever its nature, moves to the person making the promise, and that also, as in all other cases of contract, may consist of benefit to him or harm to the party with whom he is dealing. This distinction is also extremely well expressed by Chief Justice SHAW, of the Supreme Court of Massachusetts. One class of cases (within the statute) he says, is "where the direct and leading object of the promise is to become the surety or guarantor of another's debt;" the other class (not within the statute) is "where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own:" *Nelson v. Boynton*, 3 Metc. 396-400. Chief Justice SAVAGE, in this State: *Farley v. Cleveland*, 4 Cow. 432, 439, made the same classification. "In all these cases," he observed, referring to those which fall within the third class, "founded on a new and original consideration of benefit to the defendant or harm to the plaintiff, *moving to the party making the promise*, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery." In one respect this language of Chief Justice SAVAGE has greater precision than that of Chief Justice KENT. The latter speaks of the consideration as "moving between the newly contracting parties." The former characterizes it as moving to the party

making the promise. This description is more exact, as well as more comprehensive, because it includes a variety of cases found in the books, where the new consideration springs from the original debtor and not the creditor, as, for example, where the debtor, by conveyance of property or otherwise, places a fund in the hands of a third person, the latter promising, in consideration thereof, to pay the debt. But the difference is not one of principle, because there is a sense in which, even in such cases, the new consideration moves from the creditor through the debtor to the person making the promise, and on that ground many cases hold that the creditor may himself sue on the promise, although it was made to the debtor: *Lawrence v. Fox*, 20 N. Y. 268, and the cases cited. Where the promise in this particular description of cases has been made directly to the creditor, the only question has been on the Statute of Frauds; and the rule is very properly settled that they are not within the statute. The cases of *Farley v. Cleveland*, *supra*; *Gold v. Phillips*, 10 John. 412; and *Olmstead v. Greenley*, 18 Id. 12, belong to this class.

Omitting, then, the first class of collateral undertakings—I mean those made at the same time with the creation of the debt—as having nothing to do with the present question, there are two kinds of promises of extensive use in the dealings of community, which, in form and effect, very much resemble each other; each being to answer for or pay a debt already due or owing from a third person, yet wholly different in respect to the motive and consideration. In the one class the promisor has no personal interest or concern, and his undertaking is made solely upon some fresh consideration passing between the creditor and his debtor. This class is within the statute. In the other the promise may be in the same form, and when performed may have the same effect, but it is made as the incident of some new dealing in which the promisor is himself concerned, and upon a consideration passing between the creditor or the debtor and himself. This class, which may include a great variety of particular examples, is not within the statute. The distinction is broad and intelligible, although the formal resemblance in such transactions may have occasionally led to inaccuracy of expression or decision. The great body of the

cases, however, will be found to illustrate this distinction, and to establish it firmly as a guide in this branch of the law. If such a distinction were a questionable one, the tendency of the doubt would necessarily be in the direction of holding both classes of cases to be within the statute, but never in the direction of placing without the statute any one of the cases belonging to the first of these classes.

With this classification before us, it will be proper to notice more in detail the cases cited on the argument, and others not cited. In *Skelton v. Brewster*, 8 Johns. 376, the promise was held not within the statute because the debtor had delivered goods to the defendant as the consideration of the undertaking, and the plaintiff, the creditor, had discharged the debt. For two reasons, therefore, the promise by parol was good; first, it was founded on a new consideration received by the promisor; and, second, it was accepted as a substitute for the original debt; it could not be collateral.

In *Gold v. Phillips*, 10 Johns. 412, one Wood owed the plaintiffs. He conveyed land to the defendants, who, upon that consideration, bound themselves to him to pay that and other debts. Being thus bound, they so informed the plaintiffs, and agreed to pay them. The case therefore very distinctly falls within the third class, according to the distinctions above set forth. *Bailey v. Freeman*, 11 Johns. 221, was on a written guaranty made at the same time with the principal contract, and it has nothing to do with the present question. *Nelson v. Dubois*, 13 Johns. 175, is equally foreign to the inquiry. The plaintiff sold a horse to one Brundige, taking therefor the note of Brundige, payable to himself or bearer, and indorsed by the defendant. The legal proposition in the case was that a guaranty might be written over the defendant's name, it being a condition of the sale that he should become security for the price. In *Myers v. Morse*, 15 Johns. 425, the plaintiffs were liable as indorsers of a note of one H. Morse, and they held a note of the same person indorsed by the defendant. The declaration set forth that the plaintiffs had agreed not to hold the defendant liable on his indorsement, in consideration of which the defendant agreed to indemnify them against one third of any loss they might sustain on their own indorsement

of the same person's note. A plea of the Statute of Frauds was held bad. This was plainly a case where the consideration moved to the defendant himself, and therefore it was held to fall within the third class of cases, according to the distinction which has been explained. The definition of Chief Justice KENT, in *Leonard v. Vredenburg*, was expressly adopted and applied to the facts. In *Olmstead v. Greenly*, 18 John. 12, the plaintiff was an accommodation endorser on the note of B., and B. also owed him a sum of money; B. thereupon placed money and property in the hands of the defendant to provide for paying the note and the debt, and upon that consideration the defendant promised the plaintiffs to make such payment. The Court said this was an original contract on an independent consideration received by the defendant. *Farley v. Cleveland*, 4 Cow. 432, and s. c. in error, 9 Cow. 639, already mentioned, was entirely similar. The plaintiff held the note of one Moon, which the defendant promised to pay in consideration of fifteen tons of hay sold to him by Moon. The promise was held to be not within the statute. The reporter's note truly expresses the principle of the decision. It is as follows: "Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor or harm to the promisee, moving to the promisor, either from the promisee or the original debtor, such promise is not within the Statute of Frauds, although the original debt still subsists and remains entirely unaffected by the new agreement." In *Chapin v. Merrill*, 4 Wend. 657, the promise was not within the statute, because it was not collateral to any debt or liability of a third person to the promisee. The third person proposed to contract a debt with fourth parties and the plaintiff agreed to guarantee that debt, the defendant at the same time agreeing to indemnify him for so doing. The plaintiff might have invoked the statute, if his guarantee had not been in writing. But the defendant was his indemnitor merely. It was a contingent liability, of necessity original, because there was nothing to which it could be collateral. There was no debt of the third person to the plaintiff. The case, therefore, had not even the formal resemblance to the present one, which, existing in other cases, has misled the plaintiff's counsel. The cases of *Gardiner v.*

Hopkins, 5 Wend. 23; Elwood v. Monk, Id. 235; King v. Despard, Id. 277; and Meech v. Smith, 7 Id. 315, are all of them, in principle, with differences in detail, like Farley v. Cleveland, *supra*. In each of them, the consideration of the new promise moved to the defendant, proceeding either from the original debtor or the creditor, and the decisions were placed distinctly on that ground.

It cannot fail to be seen that nearly all the cases which have been mentioned, in fact all of them which exhibit a promise to pay or answer for the debt of another person, are essentially of one type. With great variety in the circumstances, one controlling characteristic pervades them all. In every instance the consideration of the promise was beneficial to the person promising. This was the feature which imparted to the promise the character of originality, as that term is used with reference to the Statute of Frauds. In not one of them is it true that the undertaking was entered into upon a consideration merely beneficial to the debtor but of no concern to the promisor; and I can confidently say that not one of those cases contains even a *dictum* which, being understood, countenances the doctrine contended for on the part of the plaintiff in this case. The principle involved is the same which runs through other cases that have not been cited. For example, A, holding the note of B, transfers it to C, upon a consideration moving from C to him, and with a parol guaranty of the payment. This, in a merely formal sense, is a promise to answer for the debt of the maker of the note, and it has been strenuously contended that such a promise is within the statute. But the rule is otherwise, it being considered that such transactions, however close to the letter, are not within the intent of the statute; because they have their root in a new dealing which concerns the promisor, and in a new consideration which moves to him. Brown v. Curtiss, 2 Comst. 225, was such a case, in which Judge BRONSON remarked: "This belongs to the third class of cases mentioned by KENT, Ch. J., in Leonard v. Vredenburg; there was a new and distinct consideration independent of the debt of the maker, and one moving between the parties to the new promise. Such are also the cases of Johnson v. Gilbert, 4 Hill,

178, and the very recent one in this Court of *Cardell v. McNeil*, decided at the last term, *ante*, p. 336.

I have not yet referred to the case of *Slingerland v. Morse*, 7 Johns. 463, which seems to be much relied on; but it does not present the question now before us. The plaintiff had distrained the goods of his tenant for rent, but did not remove them. Thereupon the defendants signed a writing in these words: "We do hereby promise to deliver to Peter Slingerland all the goods and chattels contained in the within inventory in six days after demand, or pay the said Peter \$450." Looking at the face of that writing, it is only surprising that any one could ever think it was within the Statute of Frauds. In its very terms it was original, and not collateral. It discloses no debt of any one else than the defendant, who signed it. Looking outside of it, we learn there was at least a claim made for rent due from another person, but it is quite obvious that, as a substitute for that claim, the creditor accepted the original promise of the defendant to deliver the goods or pay a sum of money. This is the evident import of the agreement itself, for it recognizes no continuing debt or liability of the tenant, nor does it undertake to pay his debt or answer for him in any way. The goods were the fund. The defendant took them under his own control (a fact which the agreement assumes), and upon that consideration made himself the primary debtor, and not the guarantor or surety. I think the case was well decided, although it is very obscurely and scantily reported.

So far, then, we find no cases or *dicta* in point. Yet it would not be true to say that the plaintiff's position is wholly unsupported by any authority in the Courts of this State. In *Mercein v. Andrus*, 10 Wend. 461, SAVAGE, Ch. J., made this remark on a motion for a new trial: "The Judge correctly stated to the jury that where the promise of one person to pay the debt of another was founded upon the consideration of surrendering up property levied on by an execution, the promise was an original undertaking, and need not be in writing to be valid." Of course, no such point was decided, because the decision granted a new trial upon another question not material to the present inquiry. The Chief Justice cited no authority. If he meant to lay down the doctrine that a new consider-

ation, moving from the creditor to the debtor, the debt still remaining, would sustain the unwritten promise of another person to pay the debt, there was no authority to be cited, for no such proposition had ever been advanced in this State. It, however, the charge at the trial and the observation of the Chief Justice assumed, as the law was, that the levy of an execution extinguished the debt, and that the release of the levy remitted the creditor to the new promisor as his only remedy, then the remark was strictly correct, but it has no application to this case. Such is probably the true explanation; and we shall presently see there are English cases under the statute standing on that ground. The plaintiff's counsel has been able, however, to cite one case which is entirely to his purpose. In *Fay v. Bell*, Lalor's Supp. to Hill and Denio, 251, the plaintiff had a lien on a pair of boots which he had mended, and in consideration of releasing that lien and giving up the boots, the defendant promised to pay his demand, which amounted to fifty cents. So far as appears, the debt still remained. The case went up from a justice's Court, through the Common Pleas, to the Supreme Court, where the question was disposed of with the single observation that the promise was "a new undertaking, founded on a new and distinct consideration, the relinquishment by the plaintiff of his lien on the boots, and which was sufficient to uphold the promise made." The remark as made is strictly true. The consideration was clearly sufficient to uphold the promise, but the Statute of Frauds requires not only a consideration but a writing. The case was of very slight importance, and the principles of the question were not examined. In the same book is another case, precisely the other way, the opinion being given by another Judge. In *Van Slyck v. Pulver*, Lalor, 47, the promise was made in consideration that the plaintiff would suspend proceedings on an execution against his debtor. This forbearance was admitted to be a sufficient consideration, and it was certainly a new one; but the promise was held void within the statute.

In all the judicial history of this State, then, there is but one adjudged case which sustains the doctrine contended for, and that is one entitled to no great consideration. I will now refer to several of a very decisive character, which furnish a

true exposition of the statute, and show that the rule is the other way. One case I have just mentioned, which is directly in point, and is of a date comparatively recent. Going back to an early day, in *Simpson v. Patten*, 4 Johns. 422, the plaintiff forebore to sue his debtor, and upon that consideration the defendant promised to pay the debt as soon as he could sell a piece of land which belonged to the debtor. The promise was held void within the Statute of Frauds, the Court observing: "A promise to pay the debt of a third person must be in writing, notwithstanding it is made on a sufficient consideration." I have some hesitation in citing *Jackson v. Rayner*, 12 Johns. 291, because it seems to me to have gone too far. The defendant had received an assignment of the debtor's property, and upon that consideration, as well as forbearance, the defendant promised to pay the demand. The Court regarded the unconditional promise as evidence that the fund was adequate. Upon the discrimination made in the later cases (heretofore cited), the conveyance of the property to the defendant was a new consideration, moving to him from the debtor, and made the promise an original one. Nevertheless, on the ground that the original debt still remained, the promise was held void under the statute. In *Smith v. Ives*, 15 Wend. 182, the declaration was on a written guaranty of a note, the consideration alleged being forbearance to sue the maker. Plea, that no consideration was expressed in the writing. The plea was held good; the Court saying: "Forbearance has never been considered a new consideration passing between *the newly contracting parties*, so as to take the case out of the statute." In *Packer v. Wilson*, 15 Wend. 343, a guaranty of the same nature, and upon the same consideration, was again held to be void. In *Watson v. Randall*, 20 Wend. 201, these propositions were expressly affirmed: 1. An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt, but, to render the promise obligatory, it must be in writing. 2. While the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing. In *Barker v. Bucklin*, 2 Denio, 45, a new trial was ordered, upon a point not now material; but the present question was quite fully examined by

Mr. Justice JEWETT. According to his views, the promise in this case is clearly void. If I were to criticise his opinion, I should say he goes somewhat too far, by reason of not discriminating so as to uphold promises where (the original debt still remaining) the new consideration moves from the creditor to the promisor, as well as from the primary debtor. In *Kingsley v. Balcome*, 4 Barb. 131, the principal cases were reviewed by Mr. Justice SILL, and his conclusion is thus stated: "The true rule is, that the new original consideration spoken of must be such as to shift the actual indebtedness to the new promisor, so that, as between him and the original debtor, he must be bound to pay the debt as his own, the latter standing to him in the relation of surety." I do not think this a perfect definition of an original promise to pay a sum for which another was previously bound as the primary debtor, because, as I have shown, there are many cases which such a definition does not include. The more we examine the original classification of Chief Justice KENT, in *Leonard v. Vredenburg*, the more we shall find it the result of a profound and masterly view of the subject; it being necessary, however, to the completeness of his definition that the new or original consideration may move to the promisor as well from the debtor as the creditor, the fundamental requisite being that such consideration must not be one wholly existing or moving between the debtor and the creditor.

These numerous authorities are decisive. They all present examples where the collateral undertaking was founded on a consideration sufficient to sustain the promise, but of no personal concern to the promisor; yet the promises were void, because they fell within the precise terms and the undoubted policy of the Statute of Frauds. Certainly, that statute was not enacted for cases where the promise would be void at the common-law for want of a consideration to sustain it. If it was not enacted for the very cases where a new consideration arises, additional to the original debt, that being insufficient according to all authority, then why was it ever passed? Indeed, the struggle in the Courts has been to withdraw from its influence, not such cases as these, but others having a close formal resemblance, yet distinguishable, not because there is a

consideration, but because it moves to the promisor, and so gives to his undertaking an original character. A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well lie to pay another man's debt as to do any other act. The success of this struggle, in a variety of instances not within the intent of the statute, should not overthrow the very object for which it was enacted.

This discussion would be incomplete without referring to the rule elsewhere than in this State. I have already mentioned the case of *Nelson v. Boynton*, 3 Metc. 396, which may be regarded as settling the question in Massachusetts. The creditor in that case sued his debtor and seized his property under an attachment. The defendant promised to pay the debt in consideration of a discontinuance of the suit. The suit was discontinued accordingly, and the lien of the attachment was thereby lost, but the debt remained against the original debtor. It was held upon the fullest consideration, Chief Justice SHAW giving the opinion, that the promise was void because it was not in writing. I regard the decision as of great value, because the cases were examined, and the discrimination between the different classes was made with entire accuracy.

Upon the argument of the present case, a passage from an English text-book was read (Addison on Contracts, p. 38) to the effect that, if the creditor has a lien or security which he is induced to part with on the faith of a promise of another person to pay the debt, the promise so made is not within the mischief intended to be provided against by the Statute of Frauds, and may be good by parol. This extract, according to its apparent meaning, seemed to indicate that in England the Statute of Frauds was essentially disregarded. The authorities referred to by the writer to sustain the proposition are: *Barker v. Birt*, 10 Mees. & W. 61; *Haigh v. Brooks*, 10 Ad. & E. 309-335; *Barrell v. Trussel*, 4 Taunt. 117; *Meredith v. Short*, 1 Salk. 25; *Castling v. Aubert*, 2 East. 325; and *Walker v. Taylor*, 6 Car. & P. 752. I have looked at these cases and find that none of them have the slightest connection with such a proposition, except the two last, which are alike, and do not sustain it. In the last case the creditor had the possession and

a lien upon certain licenses as a security for his demand, and he gave them up to the defendant, who promised to pay the debt. The case was at *nisi prius*. TINDALL, C. J., said: "It is a new contract, under a new state of circumstances. It is not, 'I will pay, if the debtor cannot;' but it is, 'in consideration of that which is *an advantage to me*, I will pay you this money.'" "There is a whole class of cases in which the matter is excepted from the statute on account of a consideration arising *immediately between the parties*." Here is the very distinction so well established in our own cases. It should be added, that the text-writer referred to could not have intended what his language apparently means; for he adds in the same connection: "In these cases the plaintiff must so shape his case as not to show or admit that there is a principal debtor liable, and that the promise of the defendant is a promise to pay that debt."

The early case in England of *Williams v. Leper*, 3 Burr. 1886, is cited and relied on to sustain the plaintiff's position; and it is, perhaps, the only one in the English Courts capable of a misinterpretation. But the case does not in fact sustain any such doctrine, and it has never been so understood in the Courts of that country. One Taylor owed the plaintiff £45 for rent. He conveyed all his effects for the benefit of his creditors, who employed Leper, the defendant, to sell them; and he advertised them for sale accordingly. The plaintiff then came to distrain, and the defendant promised to pay the rent if he would not distrain; and he desisted accordingly. LORD MANSFIELD said the defendant was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. Justice WILMOT said the defendant became the bailiff of the landlord, and when he had sold the goods the money was the landlord's in his own bailiff's hands. Therefore, he said, an action would have lain against the defendant for money had and received to the plaintiff's use. Justice YATES said it was an original consideration to the defendant. Justice ASTON thought the goods were a fund between both, "and on that foot he concurred." From the reasoning of these Judges, it seems to me perfectly evident that, if the tenant had not assigned his goods, and the defendant had no connection with them as trustee or otherwise, but the plaintiff had simply released his distress,

or right to distrain, for the benefit of the debtor alone, the promise to pay the debt on that consideration would have been held within the statute. But as the facts were, the law would imply an obligation on the defendant's part to pay over the money to the plaintiff after selling the goods; and where the law will imply a debt or duty against any man, his express promise to pay the same debt, or perform the same duty, must, in its nature, be original. The distinguishing feature of the case was, that the creditor relinquished his distress, not to the debtor, but to other creditors of the same debtor who beneficially owned the goods, and the defendant was the representative of those creditors, having the fund in his possession. If this early case had not been sometimes misapprehended, it is probable that no doubt would ever have arisen in questions like the one before us.

The cases also cited of *Houlditch v. Milne*, 3 Esq. 86; *Castling v. Aubert*, 2 East. 325; *Edwards v. Kelly*, 6 M. & Sel. 204; *Bird v. Gammon*, 3 Bing. N. C. 883; *Bampton v. Paulin*, 4 Id. 264; *Walker v. Taylor*, 6 Carr. & P. 752; and *Stephens v. Pell*, 2 Crompt. & Mees. 710, differing only in immaterial circumstances, all involved the same general principles as *Williams v. Leper*. In each of them the creditor relinquished some lien or advantage incident to his debt; but in each of them, whatsoever he relinquished was acquired by the defendant—either as a matter of personal interest and concern to himself, or to other parties whom he represented—and on that consideration he promised to pay. In none of them was any such doctrine asserted as the plaintiff contends for in this case. In all of them the engagement was deemed original, either because the primary debt was gone, or because the consideration moved to the promisor; and in some of them the decision was put on both these grounds. These cases not only elucidate more perfectly the principle of *Williams v. Leper*, but they are in themselves illustrations of the distinction which, as we have seen, is recognized in our own Courts. Referring now to *Read v. Nash*, 1 Wilson, 305, it was the case of a promise to pay to the plaintiff a certain sum if the latter would withdraw his record in an action of assault and battery against another person, and would not proceed to trial. This promise was held

not to be within the Statute of Frauds; the decision being placed on the ground that the person sued for the assault was not a debtor at all within the meaning of the statute, and could not be so considered until after verdict against him. "For aught we can tell," the Court said, "the verdict might have been in his favor." The promise, therefore, stood as at the common-law. In *Goodman v. Chase*, a debtor, taken on a *ca. sa.* at the suit of the plaintiff, was discharged with the plaintiff's consent on the defendant's promise to pay the debt. This was held an original promise, because the debt itself was extinct and satisfied by the *ca. sa.* and its discharge; and the principle of the decision is a very plain one.

I have now referred to all the decisions in the English Courts which can be supposed to favor in any degree the doctrine on which the plaintiff in this case relies; and I think it may be safely affirmed that no case has ever been determined in those Courts tending to the proposition that a parol promise to pay the debt of another person is valid where the consideration is beneficial only to the debtor, and where there is a debt which still remains against him. I will now mention a few cases, among many others, which show what the law of England is upon the precise question now to be decided.

In *Fish v. Hutchinson*, 2 Wilson, 94, the plaintiff had commenced a suit against his debtor, and the defendant, in consideration that he would stay that suit, promised by parol to pay the debt. The whole Court of King's Bench were of opinion that the undertaking was void by the Statute of Frauds; observing that there was a debt still subsisting against another person and a promise to pay it. The consideration was manifestly good, but that, moving as it did to the debtor only, did not sustain the promise without a writing. This case was decided just one hundred years ago, and the principle of it was never departed from in succeeding times. Coming down to a recent period, in *Clancy v. Piggott*, 2 Ad. & Ellis, 473, one Moore was indebted to the plaintiff, for which the latter held his goods in pledge. In consideration of surrendering the pledge to the debtor, the defendant promised, by a writing which did not express the consideration, to pay the plaintiff his debt. *Williams v. Leper*, and the other cases above referred

to, belonging to that class, were cited to sustain the undertaking; but the Court held it within the statute and void. *Williams v. Leper*, and the kindred decisions, were not overruled, or even questioned, and the case, therefore, shows how those decisions are understood in England. In *Tomlinson v. Gell*, 6 Ad. & Ellis, 564, the plaintiff's client was indebted to him for costs in a pending Chancery suit, and in consideration of a discontinuance of that suit, the defendant promised to pay those costs to the plaintiff. Held void within the statute. PATTERSON, J., observed: "It is said that a new consideration arose from the discontinuance of the suit. But I do not think it is a new one. The cases on that point are where something has been given up by the plaintiff, *and acquired by the party making the promise*, as a security of goods for a debt."

Without pursuing this discussion further, the general rule is that all promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. Such is the rule, because so is the Statute of Frauds. The statute makes no exception of any promise which is of that character. The Courts have made no exceptions, as clearly they should not. But a considerable variety of undertakings, having points of resemblance and analogy to such promises, have been held not to be within the statute. These may be chiefly, if not wholly, arranged in the following classes: 1. Where there was no original debt to which the auxiliary promise could be collateral; for example, where the promisee was a mere guarantor for the third person to some one else, and the promisor agrees to indemnify him, or where his demand was founded in a pure tort. 2. Where the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example, where such new undertaking is accepted as a substitute for the original demand, or where the original demand is deemed satisfied by the arrest of the debtor's body or a levy on his goods, the arrest or levy being discharged by the creditor's consent. 3. Where, although the debt remains, the promise is founded on a new consideration which moves to the promisor. This consideration may come from the debtor, as where he puts a fund in the hands of the promisor, either by absolute transfer

or upon a trust, to pay the debt, or it may be in his hands charged with the debt as a prior lien, as in the case of *Williams v. Leper*, and many others. So the consideration may originate in a new and independent dealing between the promisor and the creditor, the undertaking to answer for the debt of another being one of the incidents of that dealing. Thus, A., for any compensation agreed upon between him and B., may undertake that C. shall pay his debt to B. So A., himself being the creditor of C., may transfer the obligation to B. upon any sufficient consideration, and guarantee it by parol. If we go beyond these exceptional and peculiar cases, and withdraw from the statute all promises of this nature, where the debtor alone is benefited by the consideration of the new undertaking, and the debt still subsists, then we leave absolutely nothing for the statute to operate upon.

The judgment should be affirmed.

8.

Where such promise is made after the original debt has been incurred, but is made upon a consideration passing to the promisor from the promisee, then it is not within the statute, and may be oral.

CARDELL v. McNIEL.

Court of Appeals, New York, 1860.

21 N. Y. 336.

COMSTOCK, C. J. The contract for the sale of the plaintiff's horse to the defendant was concluded on the part of the latter by his agent, Acker. The agent acted under a written authority contained in a note addressed by the defendant to the plaintiff, stating that any bargain which Acker might make would be satisfactory to him, the defendant. This was a general authority, and very plainly it justified the agent in making the engagement on which this suit was brought.

By the terms of the contract, as testified to by the plaintiff's witness, Greenfield, and as found by the referee, the horse was to be paid for in a span of horses owned by the defendant, which were to be delivered to the plaintiff; by a note of \$110, to be signed by the defendant and one Ingham; by a note of \$40, given by one Burk; and by a note of \$125, given by one Cornell, payable in a buggy, on the 29th of June, 1854. The defendant, through his agent, warranted Cornell to be "good," and that the plaintiff would get the buggy when the note became due. On these terms the sale was completed, and the plaintiff delivered his horse. The notes were to be sent to the plaintiff on the following day, and they were sent accordingly. There was no written guaranty of the note of Cornell, which turned out to be worthless. The action is founded on the verbal undertaking.

We think that the plaintiff's acceptance of the note when it was sent to him, without a guaranty indorsed, worked no change in the terms of the contract. The defendant, by his agent, agreed to be answerable for the payment of the note. If that agreement was valid in law, without being committed to writing, there is no fair pretence for saying that it was waived or discharged because it was not written upon or annexed to the note, when the note was sent to the plaintiff and accepted by him. The guaranty was a verbal one, and was accepted as such when the horse was delivered on the completion of the sale, and there is nothing in the finding of the referee, or in the evidence, tending to show that a written undertaking was in the contemplation of the parties. The defendant in effect said: "I will send you the note of Cornell, and I agree to be answerable for its payment." I am unable to see how the acceptance of the note waived the agreement.

We think, in the next place, that the guaranty was in effect one of payment, according to the terms of the note, and not for the collection of the demand by process of law. The evidence and the finding are that the defendant's agent said that the maker was good, and that he would warrant that the plaintiff would get the buggy when the note fell due. The obvious meaning of this is that the obligation would be paid at maturity, and according to its terms. The contract was, therefore,

broken, and the defendant became liable to suit upon it, when Cornell failed to pay after payment was due.

It is claimed that the guaranty is void by the Statute of Frauds. In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But looking at the substance of the transaction we see that the defendant paid in this manner a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him. The question at this time hardly claims a discussion, because it was in effect decided by this Court upon the fullest consideration in *Brown v. Curtis*, 2 Comst. 225. There the holder of a note transferred it in payment of his own debt, indorsing upon it a guaranty of the payment which expressed no consideration; and on that ground the undertaking was claimed to be void. It was conceded to be void, provided the statute applied to such a case. It was, however, held to be a valid promise, on the ground that the statute did not apply. "In such cases," it was observed, "where the party undertakes, for his own benefit, upon a full consideration received by himself, the promise is not within the statute." It is impossible to distinguish in principle between that case and the present; certainly no distinction can be drawn favorable to the defendant: *Johnson v. Gilbert*, 4 Hill, 178; *Nelson v. Boynton*, 3 Metc. 400.

The note of Cornell not being paid at maturity, the defendant became absolutely charged as the guarantor, and the debt was from that time due in money. It is urged, however, that the defendant was discharged by a new arrangement made between the plaintiff and Cornell. This arrangement is not found by the referee, and that alone would be a sufficient answer to the proposition. But, upon the evidence, it is only claimed that the plaintiff agreed to wait for the buggy six weeks longer, that Cornell agreed to deliver it at the expiration of that time, and if its value was more than \$125, then that the difference was to be paid. There is no pretence that the article was in fact ever offered to the plaintiff, or indeed that it was ever

made for him. Assuming such an agreement to have been proved, it was purely executory ; it was never, in fact, executed ; and, upon the plain principles of law, it did not discharge the previous liability either of Cornell or of the defendant. There was no contract for a different article, which professed to bind both the parties, and nothing, therefore, in judgment of law, was substituted for the pre-existing agreement. There was simply an extension of time, founded on no consideration, and therefore binding on no one.

It is further said that the complaint counts upon a warranty of the note, made at the time it was sent and delivered to the plaintiff ; whereas the proof showed that the only warranty, if made at all, was given previously, at the consummation of the sale, when the horse was delivered. To this we answer : The variance does not appear to have been mentioned at the trial, and, if it had been, the pleading might have been amended, if necessary, in the Court below. In this Court, we do not reverse judgments upon objections of such a character.

All the Judges concurring, judgment affirmed.

Scott v. White, 71 Ill. 287 ; Prime v. Koehler, 77 N. Y. 91 ; Walker v. Uredenburgh, 8 John. 28.

III.

Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry, is within the statute, and must be in writing.

NICHOLAS v. WEAVER.

Supreme Court of Kansas, 1871.

7 Kan. 373.

VALENTINE, J. This was an action for the breach of a contract to marry. The judgment of the Court below was for the

defendant, and the plaintiff brings the case to Court. There were only two exceptions taken by the plaintiff to the rulings of the Court below. The first was to the sustaining of a motion of the defendant for judgment on the special findings of the jury; the second was to the overruling of a motion of the plaintiff for a new trial. The jury found a general verdict, and also special findings of facts. The general verdict was for the plaintiff, but the Court construed the special findings of fact to be inconsistent therewith—to be for the defendant—and therefore rendered judgment for the defendant. Of this, and this only, the plaintiff complains.

If the special finding and the verdict were inconsistent with each other, then the action of the Court was unquestionably correct (Gen. Stat. 684, § 287); and this is the only question for us to consider. The special finding, supposed to be inconsistent with the general verdict, read as follows:—

“7. Was the contract between plaintiff and defendant (if any was made) to be performed within one year from the date of the making of the same? *No.*

“8. Was the contract between the plaintiff and defendant (if any was made) to be performed at some remote and uncertain time? *Yes.*

“9. Was the contract (if any) between the parties in writing? *No.*”

From these special findings, the Court below construed that this contract was not to be performed until after more than one year had elapsed, and therefore, as it was not in writing, that it was not binding upon the parties; that it came within the fifth section (now sixth section) of the Statute of Frauds, which provides that “No action shall be brought whereby to charge the defendant, upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing:” Comp. Laws, 569; Gen. Stat. 505. The counsel for plaintiff claims that from these findings the contract ought to be construed as simply a contract to marry, without fixing any definite or precise time for the marriage to take place; that while the con-

tract did not require that the marriage should take place *within* one year, yet, that it did not require that it should be *postponed* beyond a year. It must be conceded that the construction put upon these findings, and upon the contract, by the Court below, is the most natural construction from the language used. Besides, nearly all the circumstances of the case tend to corroborate and strengthen the construction given to said contract and findings by the Court. Why were the jury required to make these findings if it was not to raise the question of the validity of this contract under the Statute of Frauds? Could it be from idle curiosity alone? Did not the jury know why they were required to make such findings? If the construction claimed by counsel for plaintiff is correct, then it was folly to require the jury to make these findings, for in that case they could answer no purpose whatever. The question of whether this contract came within the Statute of Frauds seems to have been one of the principal questions litigated in the case. Probably a great portion of the evidence was introduced and arguments of counsel below were made with reference to this question. But as neither the evidence nor arguments of counsel have been brought to this Court, we cannot determine what light they threw upon this question. The Court below therefore had a much better opportunity of knowing in what light these findings were viewed by the jury than we have. And if the jury viewed them in the same light that the Court did, it would be proper for us to give them the same construction, even if literally construed they should bear another and different construction.

But suppose the construction of plaintiff's counsel to be correct, then is the plaintiff in any better condition? This contract was made in the year 1860; this action was brought in the year 1869. Now, nine years thereafter, if the contract was to be performed within one year, then the action was barred by the Statute of Limitations long before this action was brought. If the contract was not to be performed within one year and not in writing, then it was void under the Statute of Frauds: *Derby v. Phelps*, 2 N. H. 515. And if the contract was made without fixing any definite time for its performance,

leaving it to be performed within a year, or beyond a year, as the parties should afterwards agree, then it was a contract to marry within a reasonable time: *Pattee v. Deboss*, 1 Starkie, 82; 1 Pars. Cont. (4th ed.) 547, 548. A reasonable time would probably not, under any circumstances, exceed one year; for it would seem to be very unreasonable that any one should be tied up by a contract to marry more than one year, unless both parties should expressly consent thereto. After a reasonable time should elapse, the Statute of Limitations would commence to run; and in this case the action of the plaintiff would have been barred long before she commenced the suit.

The counsel for plaintiff seems to have labored under great difficulty in drawing the petition in the Court below to steer clear of both the Statute of Limitations and the Statute of Frauds. Whether they did steer clear of them or not, may be questionable; but we do not desire to examine that subject, and therefore shall express no opinion thereon. The counsel probably found greater difficulties when they came to the evidence in steering clear of both these statutes than they did in framing the petition. When they reached the evidence, they probably steered clear of the Statute of Limitations, but foundered on the Statute of Frauds. The evidence probably showed that the contract was to be performed at some remote and uncertain period of time greater than, and not within a year.

If the evidence had shown that the plaintiff had a cause of action at all, the Court below would undoubtedly under the circumstances have granted her a new trial. Or if the Court had refused to do so, under such circumstances, and in such a case, the plaintiff would undoubtedly have brought all the evidence to this Court, and thereby have shown that the Court below had abused its discretion by not granting a new trial under such circumstances. With all the evidence this Court could act more intelligently than it can without the evidence. But even then our means of interpreting the language of the jury would not be as good as the means possessed by the Court below. The Supreme Court will always give the same construction to the findings and verdict of a jury that the Court

below has done, unless such construction clearly appears to be erroneous. The judgment of the Court below is affirmed.

All the Justices concurring.

Henry v. Henry, 27 Ohio State, 121 ; Clark v. Pendleton, 20 Conn. 495 ; Derby v. Phelps, 2 N. H. 515.

As to the above three propositions, see Sage v. Wilcox, 6 Conn. 1 ; Meed v. Watson, 57 Ver. 426 ; Colt v. Root, 17 Mass. 229 ; Cahill v. Bigelow, 18 Pick. 369 ; Maurin v. Fogelberg, 37 Minn. 23 ; Chase v. Day, 17 Johnson, 114 ; Yale v. Edgerton, 14 Minn. 202 ; Eddy v. Roberts, 17 Ill. 505 ; Holm v. Sandberg, 52 Minn. 427 ; Dufalt v. Gorman, 1 Id. 301 ; Wait v. Wait, 28 Ver. 350 ; Barry v. Ransom, 12 N. Y. 463 ; Osborn v. Baker, 34 Minn. 307 ; Wills v. Brown, 118 Mass. 137.

IV.

Every contract, for "the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be *void*," unless,

1.

A note or memorandum of such contract is made in writing and subscribed by the party to be charged therewith.

HANSON v. MARSH.

Supreme Court of Minnesota, 1888.

40 Minn. 1.

DICKINSON, J. The principal ground of recovery, as set forth in the complaint and as presented in the case, is the breach of an alleged contract for the sale to the plaintiff by the defendant of a threshing-machine, consisting of a separator and engine. The plaintiff had a verdict for damages. It will only be necessary, upon this appeal from an order denying a new trial, to decide as to the validity of the alleged contract with regard to

the Statute of Frauds. The following written instrument, signed by the defendant, is relied upon as a sufficient memorandum of the contract to answer the requirements of the statute: "GLENCOE, 20th May, 1887. I, John Marsh, having this day sold to Hans Hanson, of the town of Helen, county of McLeod, a certain threshing-machine (of the Agitator Separator manufacture, and a twelve-horse Minnesota Giant engine), and do by this writing agree to run with said Hans Hanson (assisting him in the running of this machine), for the term of one month, at the rate of two dollars per day. And I further bind myself not to purchase another machine for the term of two years, or to have anything to do with the running of any other machine. JOHN MARSH." It is alleged in the complaint, and further appears from the evidence in the case, that the price or consideration to be paid by the plaintiff, in performance of his part of the agreement, was \$1100. This may be taken to have been an entire price or consideration, both for the sale of the property and for the further obligation of the defendant, as expressed in the above written instrument. The plaintiff, however, alleges in his complaint that the value of the property agreed to be sold was \$1400, and that the value of the defendant's good will and assistance in the business was \$200. Deducting the latter sum from the whole contract price, it seems that, according to the estimate of the plaintiff, the sum which could be ascribed as the price of the property agreed to be sold was not less than \$900. The evidence, too, goes to show that the sale of the property was the principal subject of the transaction, to which the further agreement expressed in the memorandum was merely incident; and upon the whole case it cannot be doubted that of the whole stipulated price, \$1100, the greater part represented, in the contemplation of both parties, the price of the property agreed to be sold. Such being the case, the agreement involved a contract for the sale of chattels "for the price of fifty dollars or more," within the meaning of the statute which requires a note or memorandum of such contract to be made in writing. Such a contract is within the statute, although it also embraces some other agreement to which the statute is not applicable: *Harman v. Reese*, 18 C. B. 587; *Irvine v. Stone*, 6 Cush. 508. And see *Hodgson*

v. Johnson, El., Bl. & El. 685; and see *Rand v. Mather*, 11 Cush. 1; 59 Am. Dec. 131.

While it appears, both from the pleadings and from the evidence, that there was a definite stipulated price to be paid by the plaintiff, it will be observed, that the memorandum contains no statement of or allusion to it. The price is an essential element in a contract of sale, and a memorandum which does not state the price—unless, perhaps, in cases where, no price being stipulated, it is left to be measured by the rule of reasonable or market value—is insufficient to satisfy the statute, and the contract is, by the terms of the statute, void: *Elmore v. Kingscote*, 5 Barn. & C. 588; *Acebal v. Levy*, 10 Bing. 376; *Goodman v. Griffiths*, 1 Hurl. & N. 574; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Waterman v. Meigs*, 4 Cush. 497; *Ashcroft v. Butterworth*, 136 Mass. 511; *Stone v. Browning*, 68 N. Y. 598, 604; *James v. Muir*, 33 Mich. 223; *Browne*, St. Frauds, § 376; 1 Benj. Sales, p. 271, § 251; 2 Schoulers, Pers. Prop. § 492.

Order reversed.

As to what are goods and chattels, see *Phipps v. McFarlane*, 3 Minn. 109; *Russell v. Ry. Co.*, 39 Id. 145.

2.

Or, unless the buyer *accepts* and *receives* part of such goods, or the evidence, or some of them, of such things in action.

FONTAINE *v.* BUSH,

Supreme Court of Minnesota, 1889.

40 Minn. 141.

DICKINSON, J. This action is for the recovery of the price (more than \$50) of a large quantity of potatoes, alleged to have been sold by the plaintiffs to the defendants at an agreed price. The answer denied the sale. The Court, trying the cause

without a jury, found in favor of the defendants, upon the ground that the case was within the Statute of Frauds.

The mere oral agreement was void, under the statute, and the denial of the sale in the answer was sufficient to enable the defendants to avail themselves of that defence: *Tatge v. Tatge*, 34 Minn. 272; 25 N. W. Rep. 596; and 26 Id. 121. The case justified the finding of the Court that there had been no acceptance on the part of the defendants satisfying the requirements of the statute. The circumstances to which attention should be directed in this connection are shown to have been as follows: The agreement was made orally, at Crookston, between the plaintiffs and one Storms, an agent of the defendants. The agreement was for the sale of a carload of potatoes, at 45 cents a bushel, delivered on the track at Crookston, billed to the defendants at Minneapolis. The plaintiffs were authorized to draw on the defendants for the price when the potatoes were shipped. The potatoes were shipped by rail a few days after the agreement. When the car reached Minneapolis the defendants found the potatoes badly frozen. Thereupon the defendants telegraphed to the plaintiffs, informing them of that fact, and asking: "Shall we put in cellar for you?" The plaintiff responded by telegraph: "Handle to best advantage; cost forty here." The defendants then put the potatoes in a warehouse, picked them over, and sold them. After a part of them had been sold, the defendants remitted what had been received for them to the plaintiffs, with a letter indicating that they were thus dealing with the potatoes, not as purchasers, but for the benefit of the plaintiffs.

"Unless the buyer *accepts and receives*" is the language of our Statute of Frauds, specifying cases excepted from its operations. The *acceptance* which, under the statute, is effectual to bind the purchaser, is distinguishable from a mere receipt of goods delivered, although the latter might be sufficient to transfer the title in case there were a valid contract. In the case of an agreement void by force of the statute, an effectual acceptance can be inferred only from some act or course of conduct on the part of the buyer manifesting a present intention to receive the goods in performance of the agreement, and to appropriate them as his own. It implies on the part of the

buyer, or of an authorized agent, the exercise of volition—the determination to receive as his own, by purchase, property to the purchase of which he was not before bound: *Taylor v. Mueller*, 30 Minn. 343, 15 N. W. Rep. 413; *Simpson v. Krumdick*, 28 Minn. 352, 10 N. W. Rep. 18; *Caulkins v. Hellman*, 47 N. Y. 449; *Cooke v. Millard*, 65 Id. 352, 367; *Atherton v. Newhall*, 123 Mass. 141. Hence a delivery to a common carrier not designated by the buyer will not satisfy the requirement of the statute. That does not show an acceptance on the part of the vendee: *Simmons' Hardware Co. v. Mullen*, 33 Minn. 195, 22 N. W. Rep. 294. In view of the proposition that acceptance thus involves the election and action of the buyer, or of some authorized agent, binding him to an agreement which was before void, it logically follows that, even if the buyer at the time of making the void agreement directs that the goods be delivered to a designated common carrier for the purpose of being transported to the place where they are to come into his hands, and the goods be so delivered and transported, this alone does not bring the case within the statutory exception requiring, not only a receipt, but an acceptance of the goods; and so is the current of authority: *Leake, Cout.* 284; *Acebal v. Levy*, 10 Bing. 376; *Norman v. Phillips*, 14 Mees & W. 277; *Smith v. Hudson*, 6 Best & S. 431, 445, 448; *Ricard v. Moore*, 38 Law T. n. s. 841; *Meredith v. Meigh*, 22 Law, J. Q. B. 401; *Johnson v. Cuttle*, 105 Mass. 447; *Rodgers v. Phillips*, 40 N. Y. 519; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. Rep. 892. The mere fact that the purchasing party so directs does not justify the inference that it is intended thereby to invest such carrier with authority to bind the purchaser by an acceptance of the goods as a performance of the agreement pursuant to which they are delivered.

But in this case it cannot be taken as a fact that the defendants did appoint the carrier to whom the potatoes were to be delivered, although the appellants claim that such was the necessary result of the agreement to deliver on the track at Crookston; because, as they say, there was but one railroad line there. But this is not shown in the case to be the fact. In any view of this case, the receiving of the property by the railroad company for transportation was no act of acceptance

on the part of, or by the authority of, the defendants, such as is required by the statute; and upon the arrival of the car at Minneapolis, there having as yet been no acceptance on the part of the defendants, and no valid contract, it was in their power to refuse to accept the property, and thus to make valid the oral agreement.

Several of the appellants' assignments of error are based upon the theory which we have considered above, and deem untenable—that is, that a valid contract of sale, prior to the arrival of the car at Minneapolis, was shown. The condition of the potatoes when they reached Minneapolis, the defendants' communications to the plaintiffs respecting the same, and the manner in which they were disposed of, were properly received as a part of the *res gestæ*, affecting the question of acceptance: *Caulkins v. Hellman*, *supra*. In connection with these facts indicative of non-acceptance, there was no error in receiving the testimony of one of the defendants stating directly that they did not accept the potatoes as their property: *Berkey v. Judd*, 22 Minn. 287; *Garrett v. Manheimer*, 24 Id. 193.

Order affirmed.

Stone v. Browning, 51 N. Y. 211; *Cooke v. Millard*, 65 N. Y. 352–366; *Simmons' Hardware Co. v. Mullen*, 33 Minn. 195; *Ortloff v. Klitzke*, 43 Id. 154; *Gaslin v. Pinney*, 24 Id. 322; *Simpson v. Krumdick*, 28 Id. 352.

8.

Or, unless the buyer *at the time* pays some part of the purchase-money.

HUNTER *v.* WETSELL *et al.*

Court of Appeals, New York, 1874.

57 N. Y. 375.

EARL, C. This action was brought to recover the price of hops which plaintiff claims to have sold to the defendants. It is claimed, on the part of the defendants, that the contract was

void under the Statute of Frauds, and whether it was or not is the only question I propose to consider.

The only compliance with the statute claimed is part payment of the purchase-price. The facts are as follows: The contract was made September 27, 1867, and no portion of the purchase-price was then paid. Subsequently, the defendants paid the plaintiff \$300 upon the purchase-price, \$200 in November and \$100 in December. There is no proof of what was said about the hops or the contract when these payments were made. The evidence does not even show that the contract was mentioned or referred to. It is simply that the payments were made towards the hops.

The English Statute of Frauds, enacted in the reign of Charles the Second, did not require the payment, to render a contract for the sale of goods valid, to be made *at the time* of making the contract, neither did the statute of this State, in force prior to the Revised Statutes: 1 R. L. 80, § 15. The revisers, in their report to the Legislature, provided that the memorandum, the delivery, and the payment should be made at the *time* the contract was made. But the Legislature modified the provision as reported, and adopted it as we now find it in the statutes. The revisers deemed it important that the conditions prescribed to render the contract of sale valid should be complied with at the time of making the contract. This was an alteration of the law as it had before, for more than a century, existed in this State and in England, and the attention of the Legislature was thus distinctly called to it. It omitted the requirement as to *time*, so far as related to the memorandum and part delivery, but retained it as to the part payment. Effect must be given to this language. A contract for the sale of personal property for the price of fifty dollars or more is declared void unless one of three things be done, the last of which is payment by the buyer, *at the time*, of part of the purchase-money. Payment afterwards will not do. The payment must be made when the contract is made. Such is the plain language of the statute. Here there was but one contract made, which was in September. There was no attempt to make any other. There was no talk about any, and so far as appears no renewal, reaffirmation, or restatement in

any form of that one. All that took place afterwards was a payment of \$300 towards the hops. If this could be called a payment at the time of making the contract, within the meaning of the statute, then this provision of the statute serves no purpose, as every payment subsequently made, to apply upon the contract, would render it binding within the statute, and the provision requiring payment at the time would be nullified. A payment not made at the time can never, under any circumstances, satisfy the requirement of the statute. But when a contract for the sale of personal property, valid at common law, is made, and the buyer afterwards pays expressly to bind the contract, or when payment is made the parties then reaffirm or restate the terms of the contract, and their minds then meet so as to make a contract, the statute is undoubtedly satisfied. Such a payment is made at the time of the contract, and not afterwards.

This particular provision of the statute has not received much attention in the Courts. It seems first to have been under consideration in Massachusetts, in *Thompson v. Alger*, 12 Metcalf, 428, a case growing out of the sale of railroad stock, made in that State. In that case DEWEY, J., expresses the opinion that a payment made subsequently to the time of making the contract, with the concurrence of both parties, will answer the requirement of the statute and that the contract becomes valid from the time of such payment; but the decision of the case was put upon the ground that what took place when the payment was made was sufficient to show that the minds of the parties then met and an agreement was then made. In *Sprague v. Blake*, 20 Wend. 61, it was held that a subsequent delivery and acceptance of property sold under a contract otherwise void under the Statute of Frauds, rendered the contract valid. Judge COWEN, writing the opinion, says: "The statute does not require that the part acceptance should be at the time of the oral contract, though it seems to be otherwise of earnest-money which is to bind the bargain." In *McKnight v. Dunlop*, 5 N. Y. 537, the same provision of the statute was under consideration, and a similar decision as to the effect of subsequent delivery and acceptance was made. Judge PAIGE, writing the opinion, refers to the case of *Thompson v. Alger*, and citing

the doctrine of DEWEY, J., as to the effect of subsequent payment, says: "If the contract is not, in law, deemed to be made until the part payment of the purchase-money, and the previous invalid oral agreement is merely referred to, to ascertain the terms of the subsequent valid contract, the decision of the Supreme Judicial Court of Massachusetts may be regarded as sound." In *Bissell v. Balcom*, 39 N. Y. 274, some of the language used by Judge WOODRUFF goes far to sustain the claim of the plaintiff in this case. That was an action to recover the price of certain cattle sold by defendant to the plaintiff. At the time of the sale, the cattle were left in possession of the plaintiff, and nothing was done to make the contract binding within the Statute of Frauds. On the next day the plaintiff called upon the defendants for part payment to bind the bargain, and the defendant paid him three dollars for that purpose. It was held that the payment was sufficient for the statute. The parties came together speaking of and referring to the contract which they recognized as incomplete and invalid, and for the express purpose of a compliance with the statute the purchaser, at the request of the seller, made the payment. The contract was intentionally then made, and hence it could with propriety be held that the payment was made at the time of making the contract. In *Allis v. Read*, 45 N. Y. 142, the plaintiff agreed verbally with the defendants for the purchase of a quantity of cloths, no portion of the purchase-money being then paid or goods delivered; but, subsequently, when by the first arrangement a payment became due, the parties again met, and upon further negotiations and agreements, varying somewhat the original void contract, the plaintiff delivered to the defendants one T.'s promissory note, which was to be collected and applied by them on the purchase-price of the cloths; and he also conveyed to them certain other merchandise, which they were to sell and also apply the avails, after deducting their commissions, to the purchase-price of the cloths; and it was held that the minds of the parties must be deemed to have then met upon all the terms and conditions of the agreement for the sale of the cloths, and that it then became, by the plaintiff's transfer of the note and consignment of merchandise, a valid and binding contract under the statute. CHURCH, Ch. J.,

writing the opinion of the Court, says: "It is unnecessary to determine that every void contract may be made valid by a payment subsequent to the time of making it, but I do not hesitate to say that after a void contract has been made, the parties may make a valid contract by adopting the terms of the void contract, provided it appears that such terms are understood and assented to and a payment is made and received upon the contract. It is a valid contract from that time, and the statute is fully satisfied as if the contract had been made valid originally by a payment at that time;" and he says that he sees no objection to adopting the views of Judge DEWEY in *Thompson v. Alger*, as to the effect of a subsequent payment, with the qualification that it should appear that the parties understood and assented to the terms of the contract at the time of the payment. Some of the views expressed by Judge POTTER in *Webster v. Zielly*, 52 Barb. 482, tend to sustain the claim of the plaintiff in this case but they were unnecessary to the decision of that case, as there was a sufficient note or memorandum of the agreement to satisfy the statute. The reasoning of the learned Judge upon the question now under consideration is not satisfactory.

I have thus called attention to all the cases which have come to my notice, wherein the question now before us has been considered, and it will be seen that it has not been authoritatively decided. The following points may, however, be regarded as established: 1. Where a contract of sale has been made good at common law, but void under the Statute of Frauds, and the parties subsequently meet, and for the express purpose of then complying with the statute and making the contract valid, a payment is made by the purchaser upon the contract, at the request of the seller, such payment is made at the time of making the contract, within the meaning of the statute. It cannot be claimed that there was such a payment in this case. 2. Where, in case of such a void contract, the parties subsequently come together, and substantially restate, reaffirm, or renew its terms, so as then and there, by the meeting of their minds, to make a contract, and then payment is made upon the contract, the statute is complied with. Such was not this case. Here, when the payment was made, it does not even appear that

the contract was mentioned. The money was paid towards the hops. The purchaser was not then bound, and may not have intended to bind himself. He may have intended to leave the contract where the law actually does leave it, not enforceable against him. If such a payment answers the requirement of the statute; then it is impossible for any purchaser to make a subsequent payment towards goods purchased, or upon a prior contract of purchase, which shall not be a compliance with the statute; and thus the words "at the time," in this clause of the statute can have no meaning or effect.

I am therefore of opinion that the plaintiff should have been nonsuited, and the judgment must be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

Paine v. Fulton, 34 Wis. 83.

An *agreement* to offset a debt not sufficient: Walker v. Nussey, 16 M. & W. 302. See, also, Matthiessen, Etc. v. McMahon, 38 N. J. L. 536; Artcher v. Zeh, 5 Hill, 200.

The actual extinguishment of a debt is sufficient: Brabin v. Hyde, 32 N. Y. 519; Cotterill v. Stevens, 10 Wis. 366; Dow v. Worthen, 37 Vt. 108.

As to part payment by check, see Hunter v. Wetsell, 84 N. Y. 549.

Part payment by note of a third party sufficient: Combs v. Bateman, 10 Barb. 573.

Surrender of an existing note is sufficient: Sharp v. Carroll, 27 N. W. R. 832.

V.

CONTRACTS AFFECTING REALTY.

As a general rule, a contract creating any interest or estate in land, except leases for a term not exceeding one year, must be reduced to writing.

SCANLON v. OLIVER.

Supreme Court of Minnesota, 1890.

42 Minn. 538.

MITCHELL, J. The complaint sets out a writing executed and delivered by defendants to plaintiff, March 19, 1888. The material parts of this writing are that, in consideration of a sum of money paid by plaintiff to defendants, the latter agree to convey to the former a tract or parcel of land out of a certain 80-acre tract, not less in area than 40x120 feet, and fronting on a public street or road ; *the particular location and description of the land to be mutually agreed upon by and between the parties on or before September 1, 1888.* The writing also states what the price of the land is to be and terms of payment. The complaint alleges that no lot or tract of land has been ever agreed upon by the parties (the action was commenced April, 1889). The plaintiff also alleges that he has been informed and believes that defendants are unable to give good title, but, as he does not allege such to be the fact, the allegation is immaterial. The complaint does not allege that defendants have been requested to unite with plaintiff in an endeavor to agree on the location and description of the land, or that they have refused to do so ; but, for reasons that will appear hereafter, we deem this unimportant. The plaintiff then alleges payment to defendants of various sums in reliance upon and reference to this contemplated purchase, which defendants have refused to repay on demand. The action is to recover back this money.

That this writing does not constitute a contract is evident on

its face. There has been no assent or meeting of the minds of the parties as to the subject-matter. The writing is a mere expression of a purpose to make a contract in the future, but, beyond a certain point, the whole matter rests in negotiation or promissory statements. The parties have agreed up to a certain point, but beyond that they leave the other terms to be thereafter agreed on. This is not a contract. Assent up to a certain point is not enough; there must be assent to an agreement: *Winn v. Bull*, 7 Ch. Div. 29. And this is no more a contract because in writing than if spoken. Counsel contends that the writing is a complete contract, because it provides a mode by which the location and description of the land is to be definitely determined, but the trouble is that the mode provided is the *future agreement of the parties*. All the cases cited in support of this contention are like those of *Burton v. Cabanne*, *supra*, p. 267, and *Brown v. Munger*, *supra*, p. 482, where the writings provided definite means by which the land was to be ascertained and known, *without any further agreement* of the parties, as where one party had the exclusive right of selection, but the agreement was completed and closed. See *Cheney v. Cook*, 7 Wis. 413; *Washburn v. Fletcher*, 42 Id. 152; *Carpenter v. Lockhart*, 1 Ind. 434, 440; *Jenkins v. Green*, 27 Beav. 437. We have then a case where the parties contemplated making a contract, but have never done so. So long as it thus rested in negotiation, each party had a perfect legal right to withdraw from the negotiations at pleasure. If either withdrew, the other would have no cause of action against him. The plaintiff has never had any consideration for the money he paid. It was not paid on a contract, for there never was one to which it could apply. True, it was paid with the expectation that, if the contemplated contract was made, it would be applied on it when made. But until such a contract was made the money belonged to the plaintiff, and defendants held it as his bailees; and having withdrawn from the negotiations, as he had a perfect right to do, the defendants have no right to retain it.

Counsel refer to the familiar rule, that money paid on a contract which, under the Statute of Frauds, cannot be enforced because not in writing, cannot be recovered back, unless the

party to whom it is paid refuses or is unable specifically to perform, or the contract has been mutually abandoned. But that rule proceeds upon the ground that a good common-law contract has been made which is not void, but merely not enforceable because of a deficiency of evidence thereof: Chit. Cont. (11th Am. ed.) 928 ; *Coughlin v. Knowles*, 7 Met. 57. In such cases the terms of the contract have been orally fully agreed on, and the party knows exactly what tender and demand of performance he is to make, and, if the other party is able and willing to perform, it is his own fault if he does not have performance. But this is not a case of a complete oral contract not reduced to writing as required by the Statute of Frauds, but a case where there has been no contract at all. The writing is all there ever was between the parties, and its very terms expressly negative the idea of a contract. Our conclusion is that the demurrer was properly overruled.

Order affirmed.

DELIVERY.

Delivery is essential to a deed.

FAY, JUDGE & Co. v. RICHARDSON.

Supreme Judicial Court of Massachusetts, 1828.

7 Pick. 91.

PARKER, C. J. We have not been able to find any principle or authority to justify us in giving validity to the bond on which this suit is brought.

A bond is a deed, and delivery is essential to a deed. There are cases of a constructive delivery, but there is no evidence here to bring this case to a resemblance of them. All that appears is, that the paper was signed and sealed by the principal and sureties and was left in the hands of the principal until his death. The act of his administrator cannot make a delivery, especially as the memorandum was intended to prevent his act

being so considered. For aught we know, it was never intended by the sureties that it should be delivered until sufficient indemnity was given to them by the principal. And it may be, that finding no bond in the probate office, they have on that account omitted to seek for security which they might otherwise have obtained. The certificate on the bond, of approbation by the Judge, has no effect, it being manifest that it was made before the bond was signed ; for the letter of guardianship remained on the files, with the minute that it was to be delivered when the bond should be filed.

It is certainly a very hard case for the ward, and shows the importance of great care in the probate office ; but it would be equally hard on the sureties to hold them liable. At any rate, they insist upon the law, and we cannot withhold it. The instrument never became their bond by their definitive act of delivery, and it cannot be made so by any power of this Court.

Plaintiff nonsuit.

Smith on Contracts, § 6 ; *Heffron v. Flannigan*, 37 Mich. 274 ; *Scrugham v. Wood*, 15 Wendal, 545 ; *Regan v. Howe*, 121 Mass. 424 ; *Fisher v. Hall*, 41 N. Y. 416 ; *Stevens v. Hatch*, 6 Minn. 64 ; *Lansing v. Gaine*, 2 Johnson, 300 ; *Hawkes v. Pike*, 105 Mass. 560 ; *Thompson v. Easton*, 31 Minn. 99.

As to what constitutes an *escrow*, see *Jackson v. Sheldon*, 22 Maine, 569.

A *simple contract* in writing takes effect also from delivery : *Blanchard v. Blackstone*, 102 Mass. 343.

Such simple contract may be delivered *conditionally* : *Westman v. Krumweide*, 30 Minn. 313.

As to promissory notes, see *Marvin v. McCullum*, 20 John. 588.

RULES OF CONSTRUCTION.

I.

To ascertain the intent and meaning of the parties is the object and fundamental rule in the construction of contracts.

MATHEWS *v.* PHELPS.

Supreme Court of Michigan, 1886.

61 Mich. 327.

CHAMPLIN, J. Suit was brought by the plaintiff against the defendants before a justice of the peace, in which the plaintiff declared against the defendants in an action of assumpsit upon all the common counts, and on a memorandum of suretyship as follows:—

“DETROIT, October 22, 1883.

“It is hereby mutually agreed that William E. Moloney and Ralph Phelps, Jr., is to become the surety of Charles Savenac, for the sale of cigars, to James L. Mathews, to the extent of two hundred dollars.

“RALPH PHELPS, Jr.,

“WILLIAM E. MOLONEY.”

At the trial in the Circuit Court, to which the case had been appealed, it appeared that Mathews was a manufacturer of cigars in the city of Detroit, and had entered into an arrangement with Charles Savenac to sell cigars for him, and return the money to Mathews, for which Mathews was to give five dollars a thousand “all round,” and defendants signed the written agreement above set forth for the purpose of becoming responsible for the money Savenac did not return, and delivered the same to the plaintiff, who thereupon furnished Savenac with samples, and he proceeded to sell cigars for the plaintiff.

Under these facts, the Court construed the contract as if it read as follows :

“DETROIT, October 22, 1883.

“It is hereby mutually agreed that William E. Moloney and Ralph Phelps, Jr., is to become the surety of Charles Savenac to James L. Mathews, for the sale of cigars, to the extent of two hundred dollars.”

We think the Court construed the contract of suretyship correctly, in the light of the surrounding circumstances. If construed literally, it would be meaningless. By the transposition of a single phrase, the intention of the parties is expressed in clear and unambiguous language.

The record further shows that Savenac failed to return to the plaintiff money received by him on the sale of cigars, to the amount of \$169.04. It also appears that the sales made by Savenac for the plaintiff amounted to more than \$1000, and defendant's counsel contends that the contract of suretyship did not extend beyond the sale of \$200 worth of cigars, and was not continuous ; and, plaintiff having received returns exceeding \$200, the defendants are not liable in this action. This would be a narrow construction to place upon the terms of the contract. It is the extent of the liability, and not the extent of the sales, that is limited to \$200.

The general rule arising from the implication of the language used is that when the amount of the liability is limited, and the time is not, the contract should be construed as a continuing guaranty : *Gard v. Stevens*, 12 Mich. 295. See *Farmers' & Mechanics' Bank v. Kercheval*, 2 Id. 505.

In all cases the contract should be so construed as to carry into effect the intention of the parties ; and such intent must be ascertained from the language of the instrument, and the facts and circumstances attending the execution thereof. See *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488.

Viewing the contract under consideration in the light of the circumstances under which it was made, it is plain that the guaranty was intended to continue so long as Savenac should continue to sell cigars for Mathews, or until ended by notice from the sureties that they would not continue to be

responsible any longer; the extent of their liability being fixed at \$200.

The Court permitted plaintiff to testify to admissions of defendant Phelps as to the liability of defendants upon the contract. This the counsel for defendants insists is error, for the reason that admissions made by Phelps could not bind his co-surety, Moloney. The admissions of a copartner and of a joint contractor have been held admissible in evidence to bind, not only themselves, but their co-defendants; but whether the admissions of a surety are proper evidence to bind a co-surety is a question which need not be determined in this case. No testimony was introduced on behalf of defendants. The testimony of the plaintiff made out a case under which he was entitled to recover without the admissions as to liability of defendant Phelps. The error, if any was committed, could not by any possibility have prejudiced the defendants, and the judgment will not be reversed for that reason.

Perceiving no error prejudicial to defendants, the judgment is affirmed.

The other Justices concurred.

To same point.

GREEN BAY, ETC. CO. *v.* HEWETT, JR.

Supreme Court of Wisconsin, 1882.

55 Wis. 96.

LYON, J. The plaintiff company claims title to the whole of the land in controversy under a deed from Morgan L. Martin to it, executed in February and recorded in May, 1873. The defendants, Hewett, claim title to an undivided half of the same land under a deed to them executed by said Martin, and recorded in January, 1880. For the purposes of the case it will be assumed that Martin was the absolute owner of the land, in fee, when he executed the deed thereof to the plaintiff in 1873, and that he derived title to an undivided one-half thereof by a

deed theretofore executed to him by one Lawe, who then owned the same, and to the other undivided half by a deed dated December 23, 1871, executed to him by one Evarts, sheriff of Outagamie County, pursuant to a sale thereof on execution. The deed from Martin to the defendants, Hewett, purports to convey the same tract conveyed to him by Lawe. This deed puts the title to the undivided half which Martin derived from Lawe in the defendants, Hewett, unless that interest passed to the plaintiff company by virtue of the deed of 1873.

Whether that interest did so pass to the plaintiff under that deed is the controlling question in the case, and the only one it is necessary to determine. By the deed of 1873, Martin "released, quit-claimed, and conveyed to the plaintiff, and its successors and assigns, forever, all of his claim, right, title, and interest of every name and nature, legal or equitable, in and to all of the following-described property." (Then follows a description of the land in controversy.) Thereinafter we find this clause: "The interest and title intended to be conveyed by this deed is that, and that only, acquired by said Morgan L. Martin by virtue of a deed executed to him by Almeron B. Evarts, sheriff of said Outagamie County, dated December 23, 1871." These are the only clauses in the deed of 1873 which affect the question under consideration. The solution of this question is not without difficulty, but it is made less difficult by the arguments of the learned counsel on both sides, which display great learning, research, and ability. Counsel for the defendants maintain that the granting clause in the deed of 1873 is ambiguous, and have predicated an argument thereupon, and cited many adjudications to support it, that in such a case the last clause above quoted must control the construction of the deed. We cannot adopt the position of counsel. It seems very clear to our minds that the granting clause is not ambiguous. It conveys to the plaintiff, in express terms, all of Martin's "claim, right, title, and interest, of every name and nature, legal or equitable, in and to all of the following-described property," being the land in controversy. It is not perceived that Martin could have employed plainer or more certain language to effectuate his purpose and intention to convey *all* of his interest in *all* of the land in controversy to the

plaintiff. On the assumption that the sheriff's deed conveyed to Martin only an undivided half of the land, the clause last quoted is equally free from ambiguity. It is a plain, unmistakable expression by Martin of his intention to convey to the plaintiff only an undivided half of the land.

The rule has been invoked that deeds and contracts should be construed in accordance with the intention of the parties to them. But that is subject to this other rule, that if the instrument is free from ambiguity, such intention must be ascertained from the language of the instrument itself. In such cases, as was tersely said by Lord DENMAN in *Rickman v. Carstairs*, 5 B. & Ad. 651 (663), "the question is, not what was the intention of the parties, but what is the meaning of the words they have used." Or, as was said with equal terseness by the late Justice PAINE, in *Farmers' Loan and Trust Co. v. Commercial Bank*, 15 Wis. 463 (480), "the sole duty of construction is to find out what was meant by the language of the instrument." See also *Hubbard v. Marshall*, 50 Wis. 322, and cases cited.

Looking to the language employed in the deed of 1873, we find two conflicting intentions clearly expressed—one just as clearly and emphatically as the other. In the granting clause the grantor expresses an intention to convey his whole interest in the land, while in the other clause he expresses an intention to convey only an undivided half of his interest therein. It may here be observed that the last clause is neither an exception nor reservation, as those terms are defined in the law of conveyances. The most that can be claimed for it is, that it performs the office of an *habendum*. Yet it scarcely performs that office. It seems to be nothing more than a mere declaration of intention by the grantor in conflict with that already expressed by him in the premises or granting clause of his deed.

Which of these two conflicting clauses in the deed of 1873 should prevail? This question must be determined by rules of law other than those already mentioned governing the construction of deeds. One of these rules is, that a deed is always construed most strongly against the grantor: 4 Greenleaf's *Cruise, Real Prop.*, p. 302, tit. 32, ch. 20, § 13. Another is, that where there are two clauses in a deed, and the latter is

contradictory to the former, the former shall stand. This is an application of the ancient rule or maxim that "the first deed and the last will shall operate: " *Id.* p. 300, tit. 32, ch. 20, § 9. As, where a feoffment in fee is made to A. during the life of B., the words "during the life of B." will be rejected because they are contrary to the fee: *Id.* p. 307, § 6. If the subsequent clause in the deed of 1873 is regarded as an *habendum*, then we have this rule laid down by Cruise in the title above cited (ch. 21, §§ 75, 76): "Where the *habendum* is repugnant and contrary to the premises, it is void, and the grantee will take the estate given in the premises. This is a consequence of the rule already stated, that deeds shall be construed most strongly against the grantor; therefore he shall not be allowed to contradict or retract, by any subsequent words, the gift or grant made in the premises. Thus, if lands are given in the premises of a deed to A. and his heirs, *habendum* to A. for life, the *habendum* is void, because it is utterly repugnant to and irreconcilable with the premises."

Applying either of the above rules to the deed of 1878, it results that the premises or granting clause therein controls the other clause which conflicts with it, and hence that the deed conveyed to the plaintiff the whole of Martin's interest in the land in controversy. The foregoing are doubtless, to some extent, arbitrary rules of construction, and, because they are so, should not be resorted to except in cases of absolute necessity. If from the whole instrument the true intention of the parties can be gathered, that intention should prevail; but where, as in this case, two conflicting intentions are plainly and unequivocally expressed, there is no alternative but to construe it by these rules, even though they may be arbitrary rules.

We have not found it necessary to refer to the numerous cases cited by the respective counsel. In many of those cases cited by counsel for the defendants, the Courts found that there was ambiguity in the granting clauses which left the Courts free to effectuate the intentions expressed in the subsequent clauses, or the granting clauses contained some reference to such subsequent clauses, showing an intention that the latter should control. It is believed that our views of the case are sustained by the great weight of authority. Certainly they are sus-

tained by many of the cases cited by counsel for the plaintiff, among which is *Pynchon v. Stearns*, 11 Met. 316, which is a very instructive case on the question now under consideration. See also the cases there cited.

We conclude that the Circuit Court correctly found the issues for the plaintiff. The judgment must be affirmed.

By THE COURT. Judgment affirmed.

Smith on Contracts, 539; *Walker v. Douglass*, 70 Ill. 445; *Flagg v. Eames*, 40 Vt. 21; *Gray v. Clark & Putman*, 11 Vt. 583.

II.

To attain this object in the construction of contracts every word and clause employed should be taken into consideration.

HAYWOOD v. PERRIN.

Supreme Judicial Court of Massachusetts, 1830.

10 Pick. 228.

PER CURIAM. The first question which arises upon this report is, as to the admissibility of the parol evidence.

As it appears by the face of the note itself, that the memorandum, "One-half payable in 12 months, the balance in 24 months," was not embraced in the body of the note, but was written at the bottom, after the attestation of the subscribing witness, it was competent for either party to prove by parol evidence the time when, the person by whom, and the circumstances under which the memorandum was affixed to the note. These words might have been added after the delivery of the note, or by a stranger, or under such circumstances as not to constitute a part of the contract between the parties. Such evidence had no tendency to vary, control, or in any way affect the meaning of the contract. But we are clearly of opinion that the evidence of the declarations of the promisee, as to his

intentions in taking the contract in this form, and as to his understanding of the meaning and construction of its terms, can have no effect in giving a construction to the instrument. Having ascertained what the written words were, in which the parties expressed their contract at the time, the Court are bound to construe it according to those terms, whether clearly or obscurely expressed, and can derive no aid from the conversation and declarations of the parties at the time.

From the evidence thus admitted, it appears that after the note was written and signed, but before its delivery, the defendant objected to it as a note payable on demand; that thereupon the memorandum above recited was written, and then it was delivered as the contract of the defendant. We are then to consider the memorandum as a part of the contract, in the same manner as if it had been included in the body of the note, or placed over the defendant's signature, and it is to be construed accordingly.

In construing a contract, every word and clause shall be taken into consideration, and have an effect given to it if possible. Here we think the memorandum was intended to limit and control the generality of the words "on demand." If these words stood alone, the demand might be made immediately or at any future time. But the memorandum limits this right and restrains the promisee from making such demand, as to one-half to 12 months, and the other to 24 months. A promise to pay on demand, after a certain number of days or months, is not an unusual form of promissory note; it is an intelligible contract, and attended with no fatal repugnancy; and we think, in its legal effect, the note under consideration is similar.

It has been contended that the stipulation for a term of credit was provisional, namely, if the defendant should remain solvent. If this argument is founded upon the terms of the written contract, it would be a forced construction, not warranted by its terms. If the parol evidence is relied upon, we are of opinion, for the reasons already given, that the parol evidence is not admissible, to vary and control the plain import of the written contract.

It has been further contended that the memorandum, if it is

to have any effect, is to be taken as a distinct collateral contract, not to sue or demand payment within the time specified; upon the breach of which, if the defendant has sustained damage, he may have an action, but that it cannot be relied upon to control the original contract, within the principle of *Dow v. Tuttle*, 4 Mass. R. 414.

We think it is impossible to bring this case within that principle. Here the clause in question was part of the note, written and delivered at the same time. Besides, the terms of the memorandum are conclusive. The words are "payable," etc., that is, the money stipulated to be paid, is to be paid in a particular specified term of time. They constitute a part of the promise, and qualify it. It is impossible to regard them as a collateral and independent contract.

One instalment only being due by the terms of the note, when the action was commenced, judgment must be rendered for only one-half of the amount of the note, with interest.

Collins v. Lavelle, 44 Vt. 230; *Makepeace v. Harvard College*, 10 Pick. 298; *Morss v. Salisbury*, 48 N. Y. 636; *Northumberland v. Errington*, 5 T. R. 522; *Walker v. Boynton*, 120 Mass. 349; *Reed v. Lammel*, 28 Minn. 306.

III.

And the plain, ordinary, and popular sense of the words so employed should be allowed to prevail.

STEARNS et al. v. SWEET et al.

Supreme Court of Illinois, 1875.

78 Ill. 446.

SCHOLFIELD, J. Assumpsit was brought by appellees against appellants, and another, on five promissory notes executed by the latter to the former, bearing date April 5, 1870, and payable, respectively, in four, six, eight, ten, and twelve months from date, for different amounts, the precise statement

of which is unnecessary for the solution of the question before us. The notes, by their terms, do not require the payment of interest.

Appellants pleaded first, non assumpsit, and secondly, that they were sureties only ; that appellees were informed of that fact, and that they extended the time of payment of the notes for good consideration paid them by the principal, without the knowledge or consent of appellants. Issue was joined on the pleas, and trial had, resulting in a judgment in favor of appellees for \$1000.

The only question is, does the evidence show that appellees entered into a contract with the principal in the notes, extending the time of payment, without the knowledge or consent of appellants ?

The following indorsement appears on each of the notes : "Interest paid on the within note to July 26, '71, at the rate of ten per cent. per annum ;" and appellants each testifies that this was done without his knowledge or consent. Samuel C. Stearns testifies that he was the principal maker of the notes, and the appellants were his sureties ; that the interest was paid at the time the indorsements on the notes were made, which he thinks was on the 26th day of July, 1871. There is no other evidence tending to show a contract for an extension of time.

We do not understand the counsel as contending that the payment of interest by the principal for time past, without the knowledge or consent of the surety, will release the surety ; but merely that the payment by the principal, and acceptance by appellees, of interest on the notes to July 26, '71, created a contract whereby the time of payment of the notes was extended until the last moment of that day. Taking the word "to" in its plain, ordinary, and popular sense, as we are, in this instance, required to construe it: Chitty on Contracts, 11th Am. Ed. 113, it is clear the interest was paid only until or before the 26th inst., that is, embracing the time which was completed when the 26th day commenced. We do not conceive the illustrations referred to by the counsel at all pertinent. But, even if it should be held "to the 26th" included the whole of that day, the evidence does not show at what moment

the interest was paid ; and the burden being on appellants to prove an extension, what authority is there for presuming the payment was made in the absence of proof, at one particular moment more than another ? Why not presume it was made at the last possible moment of that day, when no time was left to which the contract could be extended on that day ?

There is, to our apprehension, an utter failure in the evidence to sustain the theory of appellants. Had it been designed, by the payment of interest, to extend the time of payment of the notes, surely, it must have been known to the principal who made the payment. He does not pretend there was such a contract, nor was it attempted to be proved by him there was.

The judgment is right and must be affirmed.

Judgment affirmed.

Hawes v. Smith, 12 Maine, 429 ; *Stettauer v. Hamlin*, 97 Ill. 312.

As to technical words, see *Rindskoff v. Barrett*, 14 Iowa, 101 ; *Robinson v. Fiske*, 24 Maine, 401.

Grammatical construction and punctuation : *Morey v. Homan*, 10 Vt. 565 ; *Hancock v. Watson*, 18 Cal. 138 ; *Willis v. Martin*, 4 T. R. 39.

Written and printed words : *Chadsey v. Guion*, 97 N. Y. 333.

And as to other subordinate rules, see *Ward v. Whitney*, 8 N. Y. 442 ; *Alton v. Transportation Co.*, 12 Ill. 37 ; *Adams v. Hill*, 16 Maine, 215 ; *Buck v. Burk*, 18 N. Y. 337 ; *Gage v. Tirrell*, 9 Allen, 299.

DISCHARGE OF CONTRACTS.

Parties to a contract may discharge their liabilities thereunder by a mutual agreement to do so.

KELLEY v. BLISS.

Supreme Court of Wisconsin, 1882.

54 Wis. 187.

LYON, J. The theory of the original complaint was that the contract between the parties for the purchase and sale of a one-twelfth interest in the vessel was purely executory ; that no

title passed to the plaintiff, and hence the vessel was at the risk of the defendant until the contract should be executed by an actual transfer of such interest to the plaintiff. If that theory is correct, the destruction of the vessel while the contract remained executory would incapacitate the defendant from conveying the agreed interest to the plaintiff, and there would be a total failure of consideration. It would be equivalent to an unqualified rescission of the contract, and the plaintiff could recover the sums he had paid on account thereof.

The theory of the answer seems to be, that if there was any contract between the parties in respect to a sale of an interest in the vessel, it was so far executed as to vest in the plaintiff the title to a one-twelfth interest therein. In that case it is quite obvious that, in the absence of any subsequent agreement, and under the circumstances of this case, the plaintiff could not maintain an action of *assumpsit* to recover back the money he had paid on account of his purchase. His remedy would be for an accounting between the owners of the earnings of the vessel, and the expenses and proceeds of the action against the tug; and he could only recover his proportionate share of the net earnings, and of the net balance realized on the judgment in such action. These remarks go upon the hypothesis that there was a total loss of the vessel. If there was not a total loss, then the cost of repairing or rebuilding the vessel (she having been rebuilt) may become an element in the accounting.

Without discussing the proposition, it is sufficient to say that we think the testimony of the plaintiff shows that the original agreement was so far executed that the title to one-twelfth of the vessel passed to and was in the defendant.

In his amended answer the plaintiff changed or rather enlarged the grounds of his action. He therein seeks to recover on the subsequent conditional agreement of the defendant to repay the money received by him on account of the original purchase by the plaintiff of an interest in the vessel. The validity of this agreement is attacked on the ground that it is unsupported by any legal consideration. This presupposes that some new consideration, moving between the parties, is essential to the validity of the agreement; but we think the law is

otherwise. We take it to be well settled that the parties to a contract may, by mutual agreement, vary or modify its terms, or rescind it, without any new consideration therefor. In the case of a modification or change of a contract, the consideration for the original agreement is imported into the new agreement which is substituted for it. Per LORD DENMAN, in *Stead v. Dawber*, 10 Ad. & El. 57; *Brown v. Everhard*, 52 Wis. 205. See also *Goss v. Lord Nugent*, 5 Barn. & Ad. 58. No good reason is perceived why the same principle does not apply to the rescission of a contract. But if it does not, the result is the same. In the case of rescission each party is released thereby from the obligations of the rescinded contract. This would seem to furnish a sufficient new consideration if one is essential to the validity of the agreement to rescind.

In *Wells v. Millet*, 23 Wis. 64, specific performance of a contract was refused for the reason, amongst others, that the parties had mutually agreed to rescind such contract. There is no discussion in that case of the question under consideration, neither is there any suggestion of a new and independent consideration, or that one is essential to the validity of the rescission.

The conditional contract alleged in the amended complaint, the conditions having been fulfilled, was in substance and effect a rescission of the original contract, and left the parties in the same position as though the plaintiff had never purchased an interest in the vessel. It relieved the plaintiff from any liability as part owner, incurred on account of the vessel, to the defendant, and the defendant from all liability to account to the plaintiff for her earnings, or the proceeds of the suit received by him. The conditions, to wit, recovery against the tug and her owners, and collection of the damages, were fulfilled, and the contract to repay the \$450 to the plaintiff thereby became absolute. Within the rules above stated, we must hold that the contract alleged in the amended complaint is valid, and if made, is ground for maintaining this action; and because the testimony tends to show that the parties made such contract, it was error to nonsuit the plaintiff.

The defendant did not interpose an answer to the amended complaint, but stood upon his answer to the original complaint.

It is claimed that those allegations of the amended complaint which are not also contained in the original, stand admitted for want of an answer. Doubtless the defendant may, if an amended complaint be interposed, stand upon his answer to the original complaint, and it will be effectual as to all averments common to both complaints. It may also be sufficiently broad to reach new averments. But if it is not, such new averments will be taken as admitted, unless a further answer thereto is made. In this case we think the averment in the answer that the contract stated in the original complaint is the only contract for the sale of any interest in the vessel ever made between the parties, is sufficiently broad to reach the new averments in the amended complaint, and should be regarded as a denial thereof. This may be a somewhat liberal construction of the answer in favor of the defendant; but in view of the fact that the objection is first made in this Court, the defendant is entitled to a more liberal construction of his pleading than would be given to it had the objection been taken earlier. See *Hazleton v. Union Bank*, 32 Wis. 34, and cases there cited. Regarding the alleged rescission of the original contract as substantially a purchase by the defendant of the one-twelfth interest in the vessel which he theretofore sold to the plaintiff, the denial in the answer is a denial of the alleged rescission. To avoid misapprehension, it should be remarked, however, that we do not think a general denial pleaded to a complaint can operate as a denial of new averments of fact in an amended complaint.

The judgment of the Circuit Court must be reversed, and the cause will be remanded for a new trial.

BY THE COURT. So ordered.

A contract to marry may be discharged by mutual assent of the parties: *King v. Gillett*, 7 M. & W. 55.

II.

The parties may discharge their liabilities under one contract by substituting another for it.

ROLLINS *v.* MARSH.

Supreme Judicial Court of Massachusetts, 1880.

128 Mass. 116.

Soule, J. Guardians of minors, spendthrifts, or insane persons do not become owners of the property which is placed under their charge. The title thereto remains in the wards. The guardians have only a naked power, not coupled with an interest. The debts of the ward remain his debts, and can be recovered by suit against him, not by suit against the guardian: *Brown v. Chase*, 4 Mass. 436; *Simmons v. Almy*, 100 Id. 239. Such suit may be defended by the guardian in behalf of the ward. The guardian cannot bind the person or estate of his ward by contract made by himself. Such contract binds him personally, and recovery for breach of it must be had in an action against him: *Hicks v. Chapman*, 10 Allen, 463; *Bicknell v. Bicknell*, 111 Mass. 265; *Wallis v. Bardwell*, 126 Id. 366. He cannot escape liability on such contracts by reciting that he makes them in his official capacity; and it is immaterial, in a suit brought against him thereon, whether he is described by his official title or not. The judgment in either case must be against him personally, and the description has no legal effect. It may be disregarded as surplusage. It is immaterial, therefore, that the cause of action is described in one count as a contract made by the defendant, and in another as a contract made by the defendant in his official capacity. The legal liability being the same in whichever form the contract is made, there is no inconsistency in the counts.

Accordingly, in *Thacher v. Dinsmore*, 5 Mass. 299, the action was brought on two promissory notes, by which the defendant "as guardian to A. L., an insane person," promised to pay the

plaintiffs or order one sum on a day certain and another on demand. There were two additional counts on the same notes, in which the promises were alleged to have been made by the defendant without adding his capacity of guardian, and a verdict having been found for the plaintiffs on the general issue pleaded, judgment was rendered upon it. Chief Justice PARSONS, in giving the opinion of the Court, said: "If an action is maintainable against any person, it must be the defendant; for the guardian of an insane person cannot make his ward liable to an action as on his own contract, by any promise which the guardian can make. Neither can the defendant be sued in his capacity of guardian, so as to make the estate of his ward liable to be taken in execution; for the judgment is not against the goods and estate of the ward in his hands, but against himself. A creditor may sue the insane person, who shall be defended by his guardian, and in that case, judgment being against the insane person, it may be satisfied by his property. The defendant's description of himself in the notes as guardian cannot vary the form of action; but it is for his own benefit, that, on payment of the notes, he may not be precluded from charging the moneys paid to the account of his ward." See also *Forster v. Fuller*, 6 Mass. 58; *Sumner v. Williams*, 8 Id. 162; *Fiske v. Eldridge*, 12 Gray, 474.

The writ against the defendant in the case at bar orders the sheriff to attach the goods and estate of "Alexander Marsh, as he was the guardian of Lucy A. Rollius," and to summon "the defendant" to appear, etc. This is a writ against the defendant personally, and is the sufficient foundation for a judgment against him. As has already been seen, a suit on a demand against a ward must be brought against the ward, not against the guardian, and the form of writ used when a suit is brought against an administrator on a contract made by his intestate is not appropriate. In such case, the order in the writ is to attach the goods and estate which were of the intestate, in the hands of the administrator. Such form is necessary there, because a judgment when obtained is to be paid out of the estate of the intestate, the title to which is in the administrator, not out of the administrator's own estate, and the writ must indicate whose estate is to be attached, if any.

This form is not necessary in the case of a ward, because the title to the estate remains in him, and does not pass to his guardian. The words "as he was the guardian," etc., have no legal effect in the writ, and may be disregarded as surplusage.

The original contract made by the defendant for the support of his ward was his own contract, and the subsequent arrangement made for further compensation to the plaintiff, was his own contract, on which he alone, if any one, was liable to the plaintiff. This clearly follows from the doctrine of the cases above cited. The defendant contends that this subsequent arrangement did not impose any liability on him, because it was without consideration. The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she should not fulfil unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforced whatever remedy he had for the breach against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement. Meanwhile the plaintiff had continued in the performance of her original agreement, which was recognized by both parties as subsisting and binding, till it was rescinded by the making of the new one. The release of one from the stipulations of the original agreement, is the consideration for the release of the other; and the mutual releases are the consideration for the new contract, and are sufficient to give it full legal effect: *Cutter v. Cochrane*, 116 Mass. 408. The action can be maintained, and, according to the terms of the report, there must be.

Judgment on the verdict.

See, as to *sealed* contracts: *Siebert v. Leonard*, 17 Minn. 433; *Munroe v. Perkins*, 9 Pick. 298-304; *Renard v. Sampson et al.*, 12 N. Y. 561.

The liabilities of one party may be discharged by a release from the other, either under seal, or based upon a sufficient consideration: *Ill. Central Ry. v. Reed*, 37 Ill. 511.

III.

Parties to a contract may, in certain cases, be discharged from liability thereunder by the *impossibility* of performance.

CORDES v. MILLER.

Supreme Court of Michigan, 1878.

39 Mich. 581.

COOLEY, J. Miller, on the fourth day of October, 1872, rented of Cordes, for the term of ten years, a wooden building in Grand Rapids, at a specified annual rent. The lease contained a covenant on the part of Cordes that "if said building burns down during this lease, said Cordes agrees to rebuild the same in a suitable time for said Miller." Miller went into possession and occupied the building for a restaurant and saloon until May 26, 1874, when it was destroyed by fire. Within a week Miller notified Cordes to rebuild, and some preparation to do so would appear to have been made by the removal of the *débris* of the fire. June 15, 1874, the Common Council of Grand Rapids passed an ordinance prohibiting the erection of wooden buildings within certain limits which embraced the site where the burned building had stood. Cordes afterwards went on and prepared plans and specifications for a larger brick building, and contracted for putting it up. Miller declined to examine the plans or to say anything about them, but in substance he said that when the building was completed he would move into it. It was completed in November, and in December Miller moved into a part of it, which was considered by the parties as being equivalent to the old building. Complaining then that the new building was not put up in a suitable time, he brought this suit on the covenant.

The principal question in the case is whether such a suit can be maintained. No question is made of the validity of the

city ordinance, and it is urged on behalf of the lessor that as the putting up of such a structure as was originally leased was thereby rendered impossible, the covenant was discharged: *Brady v. Insurance Co.*, 11 Mich., 425. On the other hand, it is argued that rebuilding is not impossible; it is only rebuilding of a specified material that is forbidden; and that Cordes when he rented his building and agreed to rebuild in case of fire, took upon himself all the risks of being compelled to make use of some other material than wood, as much as he did the risk of the rise in the cost of materials. Some stress is also laid upon the fact that the lease did not mention the material of which the old building was constructed. The Court below sustained the action.

If this judgment is correct, then Cordes had placed himself under legal obligation not only to put up a new building of some more substantial material than wood, no matter how much greater might be the cost, and to turn it over to Miller for the term at the same rent, no matter how much more the occupation might be worth. Moreover, he would be obliged to reproduce the old building, as near as the change in the material would permit, and could not compel his lessee to accept a building differently planned, subdivided, and arranged, even though it might be better and at least equally convenient. In other words, in the enforced change of material Cordes could not consult his own interest in making such modifications as the change would be likely to render important and desirable, but would be tied down to the plan and arrangement of a building which it might be well enough to reproduce in the old material, but which would never be chosen if the material were to be brick, stone, or iron.

We cannot think this the fair construction of the lease. Cordes covenanted to rebuild, if destroyed by fire, the building he leased; but did not covenant that if not allowed to rebuild that he would put up another on the same plan, of more substantial and presumably more costly material. Had the exact contingency which has since happened been in the minds of the parties at the time, it is scarcely conceivable that the lessor would have consented to put up a brick building in place of the one leased, and to receive for it the same rent the

wood building brought him, when its probable rental value would be considerably greater, and its cost presumably more.

Had this been an agreement by a builder to rebuild the old building, it would scarcely be urged that the covenant would bind him to erect a new one differing from it so radically as would a brick or a stone structure from one of wood. Had Cordes been selling this land to Miller with a similar agreement respecting the building, it would be equally plain that the change in the law could not work a change in his contract so seriously increasing his responsibility. But in principle the cases suggested would not differ from this in the least. Cordes undertook for something which by a change in the law has become illegal; and his covenant has thereby been discharged.

In this case Cordes prepared accommodations for Miller which the latter has accepted and now occupies. But they were different from the old, and Miller could not have been compelled to accept them. The arrangement was therefore one outside the lease,—not one in compliance with its terms. Probably the course of the parties has in effect been equivalent to an offer on one side and an acceptance on the other of the new quarters in place of the old and under the old lease; but no question concerning that arrangement arises here.

The judgment must be reversed, and judgment entered for Cordes with costs of both Courts.

The other Justices concurred.

To the same point.

DEXTER *v.* NEWTON.

Court of Appeals, New York, 1871.

47 N. Y. 62.

CHURCH, C. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish

the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the 161 bales in question by the sellers before delivery. The title, therefore, did not pass to the vendee, but remained in the vendor: *Joice v. Adams*, 8 N. Y. 291.

This action was brought by the purchaser against the vendor, to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by either party.

Neither inevitable accident, nor even those events denominated acts of God, will excuse him, and the reason given is that he might have provided against them by his contract: *Paradine v. Tone*, *Alleyu*, 27; *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272.

But there are a variety of cases where the Courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should

be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication: 2 Smith's Leading Cases, 50.

The same rule has been laid down as to property: "As if A. agrees to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval, the obligation is at an end:" Benjamin on Sales, 424. In replevin for a horse, and judgment of *retorno hadendo*, the death of the horse was held a good plea in an action upon the bond: 12 Wend. 589. In *Taylor v. Caldwell*, 113 E. C. R. 824, A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned: *held*, that both parties were discharged from the contract. BLACKBURN, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In *School District No. 1 v. Dauchy*, 25 Conn. 530, the defendant had agreed to build a school-house by the 1st of May, and had it nearly completed on the 27th of April, when it was struck by lightning and burned; and it was held that

he was liable in damages for the non-performance of the contract. But the Court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject-matter of the contract, and this is the rule of the civil law.

Pothier on Contracts and Sale, art. 4, § 1, p. 31. We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, recognizes such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject-matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business we may infer did, protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and, if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property, bargained without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God,

the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

Wells v. Calnan, 107 Mass. 514; *Taylor v. Caldwell*, 3 B. & S. 826; *Spalding v. Rosa*, 71 N. Y. 40; *Drake v. White*, 117 Mass. 10.

But, see further,

• *STEEES v. LEONARD.*

Supreme Court of Minnesota, 1874.

20 Minn. 494.

BY THE COURT. YOUNG, J. The general principle of law which underlies this case is well established. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified, liability. The law

does no more than enforce the contract as the parties themselves have made it. Many cases illustrating the application of the doctrine to every variety of contract are collected in the note to *Cutter v. Powell*, 2 Smith, Lead. Cas. 1.

The rule has been applied in several recent cases closely analogous to the present in their leading facts. In *Adams v. Nichols*, 19 Pick. 275, the defendant, Nichols, contracted to erect a dwelling-house for plaintiff on plaintiff's land. The house was nearly completed when it was destroyed by accidental fire. It was held that the casualty did not relieve the contractor from his obligation to perform the contract he had deliberately entered into. The Court clearly state and illustrate the rule, as laid down in the note to *Walton v. Waterhouse*, 2 Wms. Saunders, 422, and add: "In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts."

In *School Dist. v. Dauchy*, 25 Conn. 530, the defendant contracted to build and complete a school-house. When nearly finished the building was struck by lightning, and consumed by the consequent fire, and the defendant refused to rebuild, although plaintiffs offered to allow him such further time as should be necessary. It was held that this non-performance was not excused by the destruction of the building. The Court thus state the rule: "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful."

School Trustees v. Bennett, 3 Dutcher, 513, is almost identical in its material facts with the present case. The contractors agreed to build and complete a school-house, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by plaintiff, and designated in the contract. When the building was

nearly completed it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry, and unable to sustain the weight of the building; although, when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pickaxe, and its defects were latent. The plaintiff had a verdict for the amount of the instalments paid under the contract as the work progressed. The verdict was sustained by the Supreme Court, which held that the loss, although arising solely from a latent defect in the soil, and not from a faulty construction of the building, must fall on the contractor.

In the opinion of the Court, the question is fully examined, many cases are cited, and the rule is stated, "that where a party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. . . . If, before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done and he has contracted to do it. . . . No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it. . . . Neither the destruction of the incomplete building by a tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, *necessarily* prevented the performance of the contract to build, erect, and complete this building for the specific price. It can still be done, for aught that it was opened to the jury as a defence, and overruled by the Court."

In *Dermott v. Jones*, 2 Wallace, 1, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of

the work. The contractor having sued for his pay, it was held that the owner might recoup the damages sustained by his deviation from the contract. The Court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Nothing can be added to the clear and cogent arguments we have quoted in vindication of the wisdom and justice of the rule which must govern this case, unless it is in some way distinguishable from the cases cited.

It is argued that the spot on which the building is to be erected is not designated with precision in the contract, but is left to be selected by the owner; that, under the contract, the right to designate the particular spot being reserved to plaintiffs, they must select one that will sustain the building described in the specifications, and if the spot they select is not, in its natural state, suitable, they must make it so; that in this respect the present case differs from *School Trustees v. Bennett*.

The contract does not, perhaps, designate the site of the proposed building with absolute certainty; but in this particular it is aided by the pleadings. The complaint states that defendants contracted to erect the proposed building on "*a certain piece of land of which the plaintiffs then were and now are the owners in fee, fronting on Minnesota Street, between Third and Fourth Streets, in the city of St. Paul.*" The answer expressly admits that the defendants entered into a contract to erect the building according to the plans, etc., "on that certain piece of land in said complaint described," and that they "entered upon the performance of said contract, and proceeded with the erection of said building," etc. This is an express ad-

mission that the contract was made with reference to the identical piece of land on which the defendants afterwards attempted to perform it, and leaves no foundation in fact for the defendants' argument.

It is no defence to the action that the specifications directed that "footings" should be used as the foundation of the building, and that the defendants, in the construction of these footings, as well as in all other particulars, conformed to the specifications. The defendants contracted to "erect and complete the building." Whatever was necessary to be done in order to complete the building they were bound by the contract to do. If the building could not be completed without other or stronger foundations than the footings specified, they were bound to furnish such other foundations. If the building could not be erected without draining the land, then they must drain the land, "because they have agreed to do everything necessary to erect and complete the building:" 3 Dutcher, 520; and see *Dermott v. Jones*, *supra*, where the same point was made by the contractor, but ruled against him by the Court.

As the draining of the land was, in fact, necessary to the erection and completion of the building, it was a thing to be done, under the contract, by the defendants. The prior parol agreement that plaintiffs should drain the land, related, therefore, to a matter embraced within the terms of the written contract, and was not, as claimed by defendants' counsel, collateral thereto. It was, accordingly, under the familiar rule, inadmissible in evidence to vary the terms of the written contract, and was properly excluded.

In their second and third offers the defendants proposed to prove that after the making of the written contract, and when the defendants, in the course of their excavation for the cellar and foundation, first discovered that the soil, being porous and spongy, would not sustain the building, unless drained, the plaintiffs proposed and promised to keep the soil well drained during the construction of the building; that in consequence, the defendants did not drain the same; that plaintiffs for a time kept the soil drained, but afterwards, and just before the fall of the building, they neglected to drain, in consequence of

which neglect the soil became saturated with water, and the building fell ; and that a like promise was made by defendants at the beginning of the erection of the second building, followed by like part performance and neglect, and subsequent and consequent fall of the building.

The rule that a sealed contract cannot be varied by a subsequent parol agreement is of great antiquity, the maxim on which it rests, *unumquodque dissolvitur eodem modo, quo ligatur*, being one of the most ancient in our law : Broom. Leg. Max. 877 ; 5 Rep. 26 *a*, citing Bracton, lib. 2, fol. 28 ; and see Bracton, fol. 101. In early days the rigor with which it was enforced in the Courts of law led to the interference of Chancery to prevent injustice : Per LORD ELLESMERE, Earlof Oxford's case, 2 Lead. Cas. in Eq. 528* ; 1 Spence, Eq. Jur. 636. In later times that rigor has become much relaxed, although the English Courts of law have refused to permit sealed contracts to be varied by parol in cases of great hardship : *Littler v. Holland*, 3 T. R. 590 ; *Gwynne v. Davy*, 1 Man. & Gr. 857 ; *West v. Blakeway*, 2 Id. 729 ; and see *Albert v. Grosvenor Investment Co.*, Law Rep. 3 Q. B. 123.

But in this country it has become a well-settled exception to the rule, that a sealed contract may be modified by a subsequent parol agreement, if the latter has been executed, or has been so acted on that the enforcing of the original contract would be inequitable : *Munroe v. Perkins*, 9 Pick. 298 ; *Milldam Foundry v. Hovey*, 21 Pick. 417 ; *Blasdell v. Souther*, 6 Gray, 149 ; *Foster v. Dawber*, 6 Excheq. 854, and note ; *Thurston v. Ludwig*, 6 Ohio St. 1 ; *Delacroix v. Bulkley*, 13 Wend. 71 ; *Allen v. Jaquish*, 21 Id. 628 ; *Vicary v. Moore*, 2 Watts, 451 ; *Lawall v. Rader*, 24 Penn. St. 283 ; *Carrier v. Dilworth*, 59 Id. 406 ; *Richardson v. Cooper*, 25 Me. 450 ; *Lawrence v. Dole*, 11 Vt. 549 ; *Patrick v. Adams*, 29 Id. 376 ; *Siebert v. Leonard*, 17 Minn. 436 ; *Very v. Levy*, 13 How. 345 ; 1 Sm. Lead. Cas. (6th ed.) 576.

Whether the evidence offered shows a valid consideration for the plaintiff's promise, or whether it shows that such promise, though without consideration, has been so acted on as to enure, by way of estoppel or otherwise, to release defendants from their obligation to drain, are questions that were fully

discussed at the bar, but which we are not called upon to determine; for the objection is well taken by counsel for the plaintiffs that the evidence embraced in the second and third offers is inadmissible under the pleadings.

In their answer, the defendants allege an offer and promise by plaintiffs (made after the defendants had commenced work under the contract) to keep the land drained during the erection of the building. No consideration is alleged for this promise, and, as *nudum pactum*, it could of itself have no effect to vary the obligations imposed on the defendants by the sealed contract. The answer proceeds to allege "that the plaintiffs wholly and wrongfully failed and neglected to drain or cause to be drained the said piece of land, or any part of the same." It is clear that the defendants would have no rights to rely on this naked promise, followed by no acts of plaintiffs in part performance. If the defendants went on with the building without taking the precaution to drain the land, they proceeded at their own risk. The answer sets up no facts on which an estoppel can be founded, and shows no defence to the action.

But the defendants, at the trial, offered to prove, not only that the plaintiffs offered to drain the land, but also "that the plaintiffs did, for a time, keep the same drained, . . . but afterwards they neglected to do so," etc. Assuming that the facts offered to be proved would constitute a defence (and we are not prepared to say they would not), no such defence is pleaded in the answer.

The tendency of this proof was to establish a new defence, not pleaded, and to contradict, rather than sustain, the allegations of the answer. For this reason it was inadmissible, even if the facts offered to be proved would, if admissible, constitute a defence to the action. If the proof offered would have no such tendency, it was immaterial, and for this reason also was rightly excluded. And as all the evidence embraced in each offer was offered as a whole, and a part thereof was inadmissible, the entire offers were properly rejected.

The objection that the evidence offered was "incompetent, irrelevant, and immaterial," was sufficiently specific. The defendants' counsel must know the contents of the answer, and

that evidence inconsistent therewith is inadmissible, if objected to.

There was, therefore, no error in the exclusion of the evidence offered, and the order appealed from is affirmed.

IV.

If one party to a contract in writing fraudulently alters it in a material part, he thereby discharges the other party from liability thereunder.

MEYER v. HUNEKE.

Court of Appeals, New York, 1874.

55 N. Y. 412.

RAPALLO, J. At the time of the giving of the note for \$1000 there was no subsisting indebtedness from the plaintiff to the defendant for that sum. The contract of March 13, 1866, so far as related to that \$1000, still remained executory, and the right of the plaintiff to that sum was contingent upon the renewal of the lease. The contract did not call for the giving of the note, but the note and receipt were a modification of the contract made while it continued executory. By the original contract the defendant covenanted to pay the \$1000 to the plaintiff on the 1st of May, 1867, if the lease should then have been renewed. By the note this obligation was made negotiable, which it was not under the agreement, and the time of payment was extended to May 4th, 1867, the note being entitled to days of grace. The plaintiff, under the contract, might have brought his action on the 2d of May, 1867; but after the giving of the note he was not entitled to bring it until after the maturity of the note, May 4, 1867. The three papers in effect constituted the agreement between the parties, and it was necessary to produce them all at the trial.

Assuming the facts to be as offered to be proved by the

defendant, the plaintiff, after the delivery of the note to him, attempted further to modify the agreement so as to make the \$1000 draw interest. This he did by adding at the end of the note the words "with interest," without the authority of the defendant; and the defendant further offered to prove that this was done with intent to defraud him. We think that the Court below should have admitted this evidence.

Where a contract is evidenced by several writings, all of which are material to show the actual agreement of the parties, the fraudulent alteration of any of them by one of the parties invalidates all. In the present case, the addition of the words "with interest," to the note, was just as plainly an alteration of the terms of the original contract as if inserted therein. Nothing ever became due, or could become due, upon the original contract, except in conformity with the terms of the note. The note, and the receipt expressing the condition upon which it was given and to become payable, entered into and formed part of the original contract, as effectually as if the latter had expressed in terms that the \$1000 were to be paid according to the tenor of the note. The note was an essential part of the contract and of the plaintiff's proof, and on that ground, if on no other, its fraudulent alteration should preclude any recovery upon the contract.

Where a note or bill is given for a valuable consideration, existing independently of the instrument, it is well settled that the alteration of the note or bill in a material point by the holder, without authority of the maker, prevents a recovery upon the note or bill, whether the alteration be made with or without fraudulent intent. Cases are cited by the respondent, holding that where, by reason of an alteration of the instrument, a recovery cannot be had thereon, the party receiving it may still recover upon the original consideration. But in none of these cases did it appear that the alteration had been fraudulently made by the party thus seeking to recover. The counsel for the respondent cites from the opinion of BULLER, J., in *Master v. Miller*, 4 T. R. 332, that defendant cannot be suffered to pocket the money for which the bill was drawn; "that he must not get £900 by the fraud of another;" but it will be found that the opinion in which these remarks occur is

a dissenting opinion; that the right to recover on the original consideration was not legitimately in question, and that the plaintiff in the case was unaffected by any fraud. He was a *bona fide* transferee for value of the bill, and the special verdict found that the alteration was made by some person to the jury unknown. *Atkinson v. Hawdon*, 2 Adol. & Ellis, 628, is also cited; but there the question arose upon demurrer, and there was nothing to show that the alteration was fraudulently made. There was no allegation of fraud. Speaking of this case in *Clute v. Small*, 17 Wend. 238, COWEN, J., says at p. 242: "In *Atkinson v. Hawdon* the question arose upon pleading, and, for aught that appeared, the alteration was made under an honest mistake of right. Perhaps that distinction should be adopted." In *Sutton v. Toomer*, 7 B. & Cress. 416, another of the cases relied upon by the respondent, a banker's note was altered by the maker himself in the presence of the payee, and the only point decided was that this alteration made a new note of it, which required a new stamp, and that, not being stamped when altered, it was void and the customer could recover on the original consideration. The decision was based wholly on the Stamp Act. There was no wrongful alteration of the note; not a single case is cited, nor have I found any, holding that after a fraudulent alteration of the security the holder can remit himself to the original consideration.

Neither do I find any controlling authority the other way; but such cases as are to be found in the books are to the effect that a party who fraudulently alters or destroys the written evidence of his claim cannot recover on the original consideration. *Kennedy v. Crandell*, 3 Lansing, 1, holds expressly that where notes are given for the purchase-money of property sold, and are fraudulently altered by the payee by adding the words "with interest," he cannot recover either upon the notes or the consideration. In that case the action was brought by a transferee of the notes, after maturity, to whom all claims of the payee under the contract of sale were also assigned, and the complaint set forth the contract of sale as well as the notes. The plaintiff was not permitted to recover upon either. In *Trow v. The Glen Cove Starch Company*, 1 Daly, 280, a written order for advertising had been altered by raising the price to

be paid. The plaintiff was not permitted to recover for the work. In *Blade v. Noland*, 12 Wend. 173, the plaintiff sued for work and labor, and on a note which had been given therefor, alleging the note to have been lost, but it appeared that he had intentionally destroyed it under circumstances from which a fraudulent intent might be inferred. He was not permitted to recover. In *Hunt v. Gray*, 35 N. J. (Law) 227-234, and in *Lewis v. Schenck et al.*, 3 C. E. Green, 461, though the point was not involved, it is assumed that a fraudulent alteration would preclude a recovery upon the consideration.

On principle, regarding the question as an open one, I think no recovery should be permitted in a case where the holder of a written security or evidence of debt has, with intent to defraud his debtor, altered the instrument in a material part to his own advantage. "To prevent fraud was the obvious policy of the rule which avoids a written contract on account of a fraudulent alteration in a material part. It is apparent that if the party guilty of the fraud may found a claim upon the original consideration, the rule itself would be defeated:" *Mills v. Starr*, 2 Bailey, S. C. 359. To allow parties to take the chances of success in fraudulently raising the amount of the written obligations of their debtors, without risk of loss in case of detection, would be an encouragement to this description of fraud which the law should not afford.

It is said, on the other hand, that the debtor has sustained no injury by the fraud, and that he should not be permitted to profit by the unsuccessful attempt of his creditor to defraud him. It is true that where the fraud is detected in season the debtor sustains no pecuniary loss; but he has been intentionally exposed to injury. The alteration may have been so skilfully made as to render detection difficult, or the debtor might have become infirm or died, and the altered instrument successfully imposed upon his representatives. It is for the purpose of discouraging such attempts that the law denies relief to a plaintiff who comes into Court with his hands soiled with a fraud so inexcusable. That the effect of such denial will be to benefit the other party is not a sufficient ground for overlooking the fraud. It is a confidence for which the plaintiff is alone responsible, and which always ensues when the

action is founded upon a special contract which has been fraudulently altered. It is conceded that in such a case the plaintiff has deprived himself of all remedy, either upon the contract or the consideration. So, in the case of an altered deed, the grantee loses the land and the grantor is benefited. If the argument now referred to was sound, the plaintiff should be permitted in those cases to recall the alteration and avail himself of the contract or deed in its original and true form, which it is well settled he cannot do.

The cases of usurious securities taken for valid pre-existing debts, or usurious contracts for extension of time, are not analogous. There no fraud is attempted by one party upon the other. The invalidity of the securities results from statutory law, and the consequences of the violation of that law are prescribed by the law itself. These have been held to extend no farther than to invalidate the security of the contract for the extension of time, leaving the pre-existing debt unaffected. In the case of fraudulently altered instruments there is no question of statutory law, but it devolves upon the Courts to decree what shall be the consequences of a fraud deliberately and intentionally committed by one party to a contract upon the other, and of a description which affects the sanctity of written instruments, upon which the Courts are accustomed to rely for the purpose of administering justice. A party who thus attempts to falsify evidence which ought to be most reliable, is entitled to very little consideration at the hands of the tribunals whom he has so wickedly prepared himself to deceive. The cases of usurious agreements for extension of time, or usurious securities for antecedent valid debts, are analogous to the case where a note became void under the Stamp Act by reason of an alteration of its contents, made by mutual consent of the parties to the instrument. That was the case of *Sutton v. Toomer*, 7 B. & C. 416. It was in that case that such usurious arrangements were referred to, and properly, as being analogous. But they have no analogy to the case of an unauthorized alteration of a written instrument made by one of the parties thereto for the purpose of defrauding the other.

If the plaintiff has any explanation to give of the alteration

in the present case, consistent with his innocence, he will have an opportunity to present it on another trial. But this judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur. Judgment reversed.

Accidental alteration : *Neff v. Horner*, 63 Pa. St. 327.

Immaterial change : *Hunt v. Adams*, 6 Mass. 519.

V.

One party to a contract may be released from his obligations thereunder by a breach thereof on the part of the other.

BURTIS *v.* THOMPSON.

Court of Appeals, New York, 1870.

42 N. Y. 246.

INGALLS, J. This action was commenced by the plaintiff to recover damages for the breach of a promise of marriage, and she recovered a verdict of \$2000, upon which judgment was rendered, and the same was affirmed by the General Term. The promise was clearly proved, and the defendant, in the early part of October, 1862, expressly refused to marry the plaintiff at any time, and this action was commenced on the 25th of October, 1862. The defendant's counsel requested the Court to charge the jury "that the action was prematurely commenced, inasmuch as the defendant's promise was to marry in the fall of 1862, and that season had not elapsed when this suit was commenced." The Court refused so to charge, and the defendant's counsel excepted. The Court did charge as follows: "That the absolute refusal of the defendant to marry the plaintiff gave her the right to sue at once." To which the defendant's counsel excepted. The evidence leaves the time very uncertain when by the contract the marriage was to occur.

The plaintiff states as follows: "No day was fixed for the marriage, but there was a time agreed upon; it was to have taken place in the fall in which he left (of 1862). It was to have been during that fall; I don't recollect that the month was named. I got every thing that was necessary; I did not get dresses to carry out the engagement; I procured some dresses for the express purpose of carrying out the engagement; I told him I was preparing."

The defendant testifies in regard to it as follows: "I fixed no particular time to marry; no particular day or month; I might have said in the fall of 1862, I don't remember." It was in *the fall* of 1862 that the defendant refused to marry the plaintiff, and thereupon this action was commenced. Under the facts of this case, I do not think the Court was called upon to hold that after the unqualified refusal of the defendant in the fall of 1862 to marry the plaintiff, she was compelled to wait until winter before she commenced the action. The season of the year had arrived when, according to the most favorable view of the evidence for the defendant, he had agreed to perform his contract, and had absolutely refused. We do not think the defendant was entitled to defeat the plaintiff's action, and impose upon her the payment of a bill of costs, upon the ground that he had some thirty-six days, at the time the action was commenced, within which to repent and retract his refusal. Especially so when at no time did he evince a disposition to do so. I do not think that the facts of this case require us to express an opinion whether, when by a contract of marriage, a particular time is clearly fixed for its performance, and a party to it absolutely refuses to perform the contract, the other party is compelled to wait until the expiration of such time before commencing an action.

The judgment should be affirmed with costs.

Howard v. Daly, 51 N. Y. 362; McCormick v. Basal, 46 Ia. 235; Parker v. Russell, 133 Mass. 74.

Where one party makes performance on his part impossible the other is released; as in case of marriage to one person after a promise to marry another: Sheahan v. Barry, 27 Mich. 217.

VI.

The obligation of a party to a contract may be discharged by the merger of the original claim in a judgment.

WAYMAN v. COCHRANE.

Supreme Court of Illinois, 1864.

35 Ill. 152.

WALKER, C. J. The only question which we propose to consider in this case is, whether the Court below erred in computing interest at the rate of ten per cent. The bond bore ten per cent., and the mortgage given to secure its payment recites the bond and contains a covenant for the payment of the debt and interest named in the bond according to the condition thereto annexed. Afterwards the defendant in error instituted suit, and recovered a judgment at law on the bond for the principal and interest. This bill was subsequently filed to foreclose the mortgage, and subject the premises to sale for the payment of the mortgage debt and interest. On the hearing in the Court below, the Court rendered a decree for the debt and unpaid interest, at the rate of ten per cent. per annum, from the date of the bond until the rendition of the decree. It is now urged that this was erroneous, as the Court below should have allowed interest on the judgment recovered at law, at the rate of six per cent. per annum, from its date until the time of rendering the decree.

The general rule is, that by a judgment at law or a decree in chancery, the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment. By the judgment of the Court, it loses all of its vitality and ceases to bind the parties to its execution. Its force and effect are then expended, and all remaining legal liability is transferred to the judgment or decree. Once becoming merged in the judgment

no further action at law or suit in equity can be maintained on the instrument. All rights and liabilities originally imposed by, or growing out of, the instrument or agreement terminate with the judgment of the Court. This being so, when the judgment was rendered on the bond in this case, it ceased to be evidence of the debt, and the judgment then became the evidence and only evidence that could be used in a Court of the existence of the original debt. And that debt could only bear six per cent. interest, whether evidenced by a judgment or a decree: *White v. Hoffaker*, 27 Ill. 349. Then if the judgment was the evidence, the decree should have been for the amount of the judgment with six per cent. interest thereon from the date of its rendition to the time the decree was rendered.

The mortgage is only an incident of the debt: *Olds v. Cummings*, 31 Ill. 188; *Vansant v. Allmon*, 33 Id. 30; *Sargent v. Howe*, 21 Id. 149. And the assignment of the debt, in equity, carries with it the benefit of the security. No principle is better settled than that the payment or discharge of the debt satisfies the mortgage. It can only exist and draw aliment from the debt to which it is incident. When the debt has changed to a judgment, the mortgage then is changed, in effect, to a security for the payment of the judgment. The satisfaction of the judgment by the payment of the sum recovered, with six per cent. interest per annum, would discharge the mortgage. The assignment of the judgment would be an equitable transfer of both the judgment and the mortgage.

The mortgage being an incident of the bond, when it became merged in the judgment the mortgage was then a security for its payment and no more. A suit on the covenant could only be maintained to recover damages equal to the judgment and interest. A party cannot recover on the same contract different measures of damages. When the debt was reduced to a judgment it reduced the interest to six per cent., and the security can be no larger or capacious than its principal, and could only be held for the judgment and its interest.

The questions in reference to service on Jane Wayman have been discussed and determined, in the case of *Wayman v. Crosier*, *post*. We therefore deem it unnecessary to again discuss them here.

The decree of the Court below must be reversed, and the cause remanded for further proceedings not inconsistent with the principles announced in this opinion.

Reversed and remanded.

If the judgment is set aside, the original obligations revive: *Clark v. Bowen*, 22 How. 270.

VII.

The liabilities of a party to a contract may be discharged by the expiration of the time allowed under the Statute of Limitations for bringing actions to enforce them.

LITCHFIELD v. McDONALD.

Supreme Court of Minnesota, 1886.

35 Minn. 167.

BERRY, J. This is an action upon a constable's bond, which counsel on both sides treat as having been executed under Gen. St. 1878, c. 10, § 42, but which appears to us to have been executed under section 1, subchapter 3, of the charter of the city of Austin, found in chapter 1, Sp. Laws, 1876. But, however this may be, we are clear that the bringing of an action upon it is controlled by sections 1, 2, and 3, chapter 78, Gen. St. 1878. The last clause of section 42, *supra*, is not at all inconsistent with these sections, and does not operate to supersede or dispense with them as respects actions upon constables' bonds.

But we are also clear that the leave which these sections require a private person to obtain from a District Court or Judge, before bringing an action upon such a bond, is no part of such person's cause of action. His cause of action (if any he has) accrues independent of and prior to the application for leave, and is the very basis upon which the application rests; and hence a statute of limitation commencing to run from the date

when his cause of action accrues, commences to run from the same time that it would commence if no such leave were required; that is to say, in a case like this at bar, the statute commences to run from the time when the wrong complained of was done, and not from the time of obtaining leave to sue. In this case over six years elapsed between the commission of the wrong complained of and the institution of the action, so that the action is barred both under the first subdivision of section 6 and the first subdivision of section 7, chapter 66, Gen. St. 1878, whichever may be applicable; and as this fact as to the lapse of time is distinctly alleged in the complaint, the defendants' demurrer should have been retained.

The view which we have expressed may appear to be inconsistent with that taken in *Wood v. Myrick*, 16 Minn. 447 (494), followed in *Lanier v. Irvine*, 24 Id. 116. We have only to say that we have so little doubt of the unsoundness of the view taken in *Wood v. Myrick* that, while we have no intention to disturb it as applied to chapter 55, Gen. St., and to the particular case of probate bonds there treated of (for this might work mischief), we do not think it ought to be extended to cases governed, as is the present, by the provisions of chapter 78. If nothing but a mere and ordinary question of practice were involved, we should feel some hesitation in departing from the analogy of *Wood v. Myrick*; but to allow a party to extend the time within which he will bring his action upon an official bond against sureties, as well as the principal, indefinitely, by postponing his application for leave to sue is not only anomalous, but so contrary to the entire spirit, policy, and purpose of statutes of limitation, and so impolitic in itself that the question mentioned is one of very great practical and substantial importance, and there is no sensible reason why the obtaining of leave to sue and the institution of the action should not both take place within the period limited for the bringing of the action.

Order affirmed.

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